

(26,243)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 776.

AMERICAN FIRE INSURANCE COMPANY, PLAINTIFF IN
ERROR,

vs.

KING LUMBER & MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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1 Be it remembered that on the 25th day of August, A. D. 1916, at a regular term of the Supreme Court of the State of Florida, came the plaintiff in error, American Fire Insurance Company, a corporation, by counsel and filed in the Clerk's office of the Supreme Court of Florida a transcript of the record of the proceedings and judgment of the Circuit Court of the State of Florida in and for the County of De Soto in a certain cause wherein King Lumber & Manufacturing Company, a corporation, was plaintiff and American Fire Insurance Company, a corporation, was defendant, and of the writ of error therein from the final judgment of the Circuit Court therein rendered, which said transcript of the record of the cause aforesaid and subsequent proceedings to judgment and writ of error thereto is in the words and figures as follows, to-wit:

2 Transcript of Record of Proceedings in the Circuit Court of De Soto County, Florida, in the suit of King Lumber & Manufacturing Company, a corporation, plaintiff, vs. the American Fire Insurance Company, a corporation, defendant, therein lately pending.

On the 30th day of September, 1914, the plaintiff filed its amended declaration in the words and figures following, to-wit:

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida, in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation, Incorporated under the Laws of the State of Florida,

vs.

THE AMERICAN FIRE INSURANCE COMPANY, a Foreign Corporation.

Damages \$4,000.00.

The King Lumber & Manufacturing Company, a corporation incorporated under the laws of the State of Florida, by Treadwell & Treadwell, its attorneys, sues The American Fire Insurance Company, a foreign corporation.

For that for and in consideration of \$374.74 to it in hand paid, and payment acknowledged, the said defendant issued to plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promised the plaintiff in the terms of the said policies and upon the conditions therein annexed to insure the said plaintiff against loss or damage by fire to the amount of \$2,500.00 by each of said policies, both aggregating \$5,000.00, and to make good unto said plaintiff the loss or damage that should happen by fire, not exceeding said sum mentioned in each of said policies, to-wit, the

sum of \$2,500.00, aggregating \$5,000.00, one of said policies being for the term of one year from the 14th day of April, 1912, and the other policy being for the term of one year from the 27th day of April, 1912, the first policy of the last above mentioned expiring April 14, 1913, and the other policy expiring April 27, 1913, and being on certain property described in the two said insurance policies, copies of which are hereto attached and made a part of this plaintiff's declaration and marked exhibits A and B and prayed to be taken as a part hereof as fully as if the same were particularly herein set forth, and it was provided in and by said policies that in case of loss the same was to be paid within sixty days after due notice and proof was made by plaintiff and received by defendant, and in said policies sundry provisions, conditions, prohibitions and stipulations were and are contained and thereto annexed as will be shown by said copies hereto attached as aforesaid, and afterwards, to-wit, on November 27, 1912, part of said property so assured in said policies described was burned and destroyed by fire, or partly burned and destroyed by fire and damage and loss was thereby accrued to plaintiff to the amount of \$21,028.17 in such circumstances as to come within the promise and undertaking of said policies, a particular description of the property so destroyed and burned by fire & proofs thereof and the property damaged and burned by said fire and which was insured by such policies will be shown by a statement of the same hereto attached and made a part hereof and marked exhibits C & D and prayed to be taken as part of the plaintiff's declaration.

Plaintiff further shows that in and by said policies it is provided that there was \$45,750.00 insurance on said property described in said policies and that said defendant should only be liable for its pro rata share of any loss caused by fire under the provisions of said policies. Plaintiff further shows that on the date of said fire there was \$45,750.00 insurance on said property described in said policies, including the amount of the policies of defendant, and that the loss sustained by plaintiff by said fire was \$21,028.17, and that defendant's pro rata share of said loss under each of said policies was \$1,149.08, and that defendant's pro rata share of said loss under both of said policies was \$2,298.16.

Plaintiff further shows that said loss by fire to plaintiff's property was such as to render liable and oblige the said defendant to pay unto the plaintiff its pro rata share of said loss, to-wit, the sum of \$2,298.16, on the property aforesaid, of which loss the defendant had due notice by proof duly made on December 16, 1912.

Plaintiff further shows that the value placed upon all the items 2, 4, 6, 8, 10, 12 and 13 of the schedule attached to said policies and the property described therein was not greater than three fourths of the value of each item so destroyed by said fire, said valuation being based upon its value immediately preceding said fire.

Plaintiff further shows that although all conditions have been performed and fulfilled and all events and things existed and happened and all periods of time have elapsed to entitle the plaintiff to a performance by the defendant of said contract of insurance and to entitle

plaintiff to the said sum of \$2,298.16, and nothing has occurred to prevent plaintiff from maintaining this action, still the defendant has not paid nor made good to the said plaintiff said amount of loss and damage aforesaid or any part thereof, but refuses so to do.

Plaintiff further shows and states the fact to be that at the time of the issuance of said policies, plaintiff was the unconditional and sole owner of the property insured.

Plaintiff further shows that by reason of said defendant's refusal and failure to pay said sum of money, due as aforesaid under said policies, that said plaintiff has been forced to employ attorneys to represent it in this suit, and plaintiff claims and demands of defendant the sum of \$400.00 as reasonable attorneys' fees to be allowed plaintiff's said attorneys for services in its behalf in this cause.

Therefore plaintiff brings this its suit and claims the sum of \$4,000.00 damages in this behalf sustained.

TREADWELL & TREADWELL,
Attorneys for Plaintiff.

(Here follow policies marked pages 5 and 6.)

CHART

TOO

LARGE

FOR

FILMING

Sworn Statement to the American Fire Insurance Co. of Philadelphia, in Proof of Loss under its Policy Number 15565.

Expiring April 27, 1913.

Issued at its agency at Philadelphia to King Lumber and Manufacturing Co. (hereinafter called the Assured) for (\$2500.) Twenty-five Hundred 00/100 Dollars, as set forth on the reverse side hereof under Schedule "A," which is an exact copy of the written portion of said policy and all endorsements, transfers and assignments that have been made thereon or attached thereto.

The Affiant does hereby declare on oath, that by fire occurring about 11:15 A. M. on November 27, 1912, which said fire was not caused by any act, procurement or design of the Assured or this Affiant, nor by any of the perils excepted by or not insured against under said policy, but originating in Cause unknown; fire discovered on roof of veneer mill (state in what building and in what part of the building and from what cause the fire originated), the said Assured has sustained loss and damage as set forth in Schedule "B," attached hereto and made a part thereof, which schedules correctly state, in detail, the Actual Cash Value of each specific subject described and insured under said policy, the Total Insurance Thereon and the Loss and Damage Thereto, for which the Assured claims and agrees to accept in full satisfaction of all claims under said policy, by reason of said fire, the sum of (\$1149.08) Eleven Hundred Forty-nine 08/100 Dollars.

The Affiant does further declare on oath that the total insurance covering, at the time of said fire, in whole or in part, on any of the within described and insured property, including the above and all other policies, binders or other agreements to insure, whether valid or invalid, was \$45,750, and no more, as set forth in Schedule "C," attached hereto and made a part hereof.

The building insured or containing the property insured was occupied at time of fire by Assured as veneer mill (state by whom and for what purpose each part of building was occupied).

There has been no change in the use or occupancy of or the exposure to said premises nor any change in the Assured's title, use, or possession of, or incumbrance on any of said insured property, since the issue of said policy, except, (if none so state) (Mortgage to W. G. Wells dated 1906) None.

At and from the time said policy was issued, to and at the time said fire occurred, the Assured's Title to all the buildings described as insured hereunder and the ground upon which said buildings were situated, was that of sole and unconditional owner in fee simple, and there was, and is now, no lien, mortgage or incumbrance of any nature upon any of said insured property, and no other person than the Assured has any interest therein, except mortgage to W. G. Wells (if there are any liens or incumbrances, state amounts and to whom payable).

The Affiant further declares that nothing has been done by or with the Assured's or his Affiant's privity or consent to violate the

conditions of said policy, and that no articles are included in the annexed schedules that did not belong to the Assured and were not contained in the said buildings and damaged or destroyed by said fire, that no property saved has been concealed and that no attempt has been made to deceive the insurer in any manner as to the cause or extent of said loss.

And the Assured does hereby agree that any further information that may be required will be furnished on demand, and that the furnishing of this blank and / or the preparing of any schedules or statements of said loss by any representative of the insuring company is an act of courtesy to the Assured, and shall not be construed or pleaded as an admission of liability on its part or a waiver of any of the conditions of said policy.

KING LUMBER & MFG. CO.,
Assured,

Per _____, *Sec. & Gen. Mgr.*

Dated at Nocatee, Fla., Dec. 16, 1912.

Subscribed and sworn to before me, a Notary Public, in and for the County of De Soto, State of Florida, the day and year next above written.

[SEAL.]

A. B. STROUD,
N. P.

My commission expires April 14, 1915.

EXHIBIT "C."

Schedule "A"—Policy Form.

Below must be given a complete copy of the written or printed form describing the property insured, together with all clauses, endorsements and assignments, whether they are written on the policy or on forms attached thereto.

If policies are not concurrent, copies of all forms attached to the non-concurrent policies covering in whole or in part on the same property must also be attached hereto.

SCHEDULE "B" AND SCHEDULE "C."

Schedule "B." Statement of "Actual Cash Value" of Property Insured and Loss and Damage Thereto.

*Statement of Loss—King Lumber & Mfg. Company, Nocatee, Fla. Fire of November 27th, 1912, 11.15 A. M.
Cause, unknown; discovered on roof of veneer mill.*

Item 1.	Not involved.				
Item 2.	Machinery saw mill, value \$12,000.00—ins. Loss and damage, machinery in yard and Companies pay. $\frac{3}{4}$ value clause does not reduce payments.		\$8,500.00		475.00
Item 3.	Not involved.				
Item 4.	Not involved.				
Item 5.	Veneer building, 64 x 145 x 28 ft. and additions. Cost to rebuild per estimate Less dep. 25%		\$4,724.38 1,181.09 <hr/>		2,500.00
	Sound value and loss.....		3,543.29		
	Insurance and Companies pay $\frac{3}{4}$ value clause does not reduce payments.				
Item 6.	Veneer mill machinery. Total schedule, present prices Less dep. 25% (6 yrs. old)		\$22,901.50 5,725.37 <hr/>		
	Sound value and loss.....		17,176.13		
	Less $\frac{3}{4}$ for $\frac{3}{4}$ value clause.....		4,294.03 <hr/>		
	Insurance, \$13,750.00, Companies pay.				12,892.10
Item 8.	Boilers, sound value..... Loss and damage in detail		\$4,500.00 526.40 <hr/>		500.00
	Insurance \$500.00, Companies pay $\frac{3}{4}$ value clause does not reduce payment.				

Item 9.	Not involved.	
Item 10.	Not involved.	
Item 11.	Stock in cars, sheds, platforms, and in outside premises.	957.50
	Inventory in sheds before fire.....	225.00
	15000' lumber @ \$15.00	225.00
	12000' logs and blocks @ \$10	120.00
	Blocks and board ends, fuel for sale	50.00
	Full capacity, stock in ten veneer racks @ \$130	1,390.00
	Lumber at mill, per inventory after fire:	
	30000' No. 3 common rough @ \$7.50	225.00
	70000' Rough & dressed @ 14.00	980.00
	Sound value.....	3,947.50
	Value saved, per inventory.....	1,205.00
		2,742.50
	Loss and damage.....	2,171.07
	Insurance \$2,500.00, Companies pay.....	3,158.00
	Insurance required by 80% co-insurance clause.....	2,500.00
	Actually carried.....	658.00
	Aesured co-insurer.	\$2,171.07
	The \$2,500.00 insurance pays.....	571.43
	The \$658.00 co-insurance.....	
	Loss and damage.....	2,742.50
Item 12.	Not involved.	\$14,687.63
Item 13.	Stock in veneer mill.	4,938.06
	Inventory Nov. 1st, 1912.....	
	Mds. per daily reports.....	19,655.69

KING LUMBER & MANUFACTURING COMPANY.

10

Add stock in process, estimated.....	1,285.00
	<u>20,940.69</u>
Less sales, per books.....	8,783.50
Less inventory in sheds.....	957.50
Less inventory in W. Ho.....	7,453.54

Sound value and loss
Insurance \$2,500,00, Companies pay
80% co-insurance clause does not reduce payment.

Summary.		Value.	Loss.	Insurance.	Pays.
Item	2	12,000.00	475.00	8,500.00	475.00
5	3,543.29	3,543.29	2,500.00	2,500.00
6	17,176.13	17,176.13	13,750.00	12,882.10
8	4,500.00	526.40	500.00	500.00
11	3,947.50	2,742.50	2,500.00	2,171.07
13	3,746.15	3,746.15	2,500.00	2,500.00

Total insurance \$43,750.00—all policies concurrent..... 21,028.17

\$1,000.00 Pays \$459.63.

AMERICAN FIRE INSURANCE COMPANY VS.

King Lumber Company, Nocatee, Florida—Fire of November 27th, 1912.

Insurance and Apportionment.

Company and number.	Expiration.	Insured.	Pays.
58,312 American Union of Phila.....	1— 1—13	1,000.00	459.63
164,864 " " "	10—21—13	500.00	229.82
15,564 " Fire, Phila.....	4—14—13	2,500.00	1,149.08
15,565 " " "	4—27—13	2,500.00	1,149.08
57,301 Citizens, Baltimore.....	8—18—13	1,000.00	459.63
23,893 Federal Underwriters, D. C.....	11—16—13	1,500.00	689.45
85,144 Fireman's Fund.....	3—25—13	3,500.00	1,608.72
129,856 " " "	5—10—13	2,500.00	1,149.08
129,867 " " "	9—28—13	1,500.00	689.45
129,847 " " "	5—10—13	1,250.00	574.53
3,167 Hamburg Bremen.....	10— 7—13	1,000.00	459.63
3,180 " " "	10—27—13	1,500.00	689.45
716,522 National of Hartford.....	2—21—13	2,500.00	1,149.08
478,637 New Brunswick, N. J.....	10—27—13	2,000.00	919.26
755,732 Nassau.....	2—26—13	1,500.00	689.45
2,202,265 National General, London.....	11—16—13	2,750.00	1,263.90
2,103,594 " " "	11—18—13	3,750.00	1,723.63
2,103,595 " " "	11—16—13	1,250.00	574.53
70,977 Palatine People's National, Phila.....	5— 2—13	1,500.00	689.45
197,702 " " "	4—21—13	1,500.00	689.45
152,223 " " "	7—25—13	1,500.00	574.53
51,691 Sun of N. O.....	5— 8—13	1,250.00	804.36
4,214,776 Scottish Un. N.....	12—10—12	1,750.00	

4,322,843	"	"	10—19—13	1,750.00
4,191,690	"	"	5—19—13	1,500.00
3,754,931	London Assurance		2—12—13	1,000.00
Totals.				45,750.00
				<hr/> 21,028.17

\$1,000.00 Pays \$459.63.

All policies concurrent, using printed form schedule.

Schedule "C." The "Total Insurance" thereon and the "Amount Claimed" under each policy.

State whether all policies are concurrent and list all policies in alphabetical order, giving the expiration of each.

Claim No. 1,111,111

**Sworn Statement
in
Proof of Loss
to the**

of Insurance Co.
Assured

Agency
Date of Fire
Policy No.
Amount of Policy \$
Amount Claimed \$
Less Discount \$
Amount Paid \$
Adjustment Expense \$

8 *Sworn Statement to the American Fire Insurance Co. of Philadelphia, in Proof of Loss under its Policy Number 15564.*

Expiring Apr. 14, 1913.

Issued at its agency at Philadelphia to King Lumber and Manufacturing Co. (hereinafter called the Assured) for (\$2500) Twenty-five Hundred 00/100 Dollars, as set forth on the reverse side hereof under Schedule "A," which is an exact copy of the written portion of said policy and all endorsements, transfers and assignments that have been made thereon or attached thereto.

The affiant does hereby declare on oath, that by fire occurring about 11:15 A. M. on November 27, 1912, which said fire was not caused by any act, procurement or design of the Assured or this Affiant, nor by any of the perils excepted by or not insured against under said policy, but originating in Cause unknown; fire discovered on roof of veneer mill (state in what building and in what part of the building and from what cause the fire originated), the said Assured has sustained loss and damage as set forth in Schedule "B," attached hereto and made a part thereof, which schedules correctly state, in detail, the Actual Cash Value of each specific subject described and insured under said policy, the Total Insurance Thereon and the Loss and Damage Thereto, for which the Assured claims and agrees to accept in full satisfaction of all claims under said policy, by reason of said fire, the sum of (\$1149.08) Eleven Hundred Forty-nine 08/100 Dollars.

The Affiant does further declare on oath that the total insurance covering, at the time of said fire, in whole or in part, on any of the within described and insured property, including the above and all other policies, binders or other agreements to insure, whether valid or invalid, was \$45,750, and no more, as set forth in Schedule "C," attached hereto and made a part hereof.

The building insured or containing the property insured was occupied at time of fire by Assured as veneer mill (state by whom and for what purpose each part of building was occupied).

There has been no change in the use or occupancy of or the exposure to said premises nor any change in the Assured's title, use, or possession of, or incumbrance on any of said insured property, since the issue of said policy, except, (if none so state) (Mortgage to W. G. Wells dated 1908) None.

At and from the time said policy was issued, to and at the time said fire occurred, the Assured's Title to all the buildings described as insured hereunder and the ground upon which said buildings were situated, was that of sole and unconditional owner in fee simple, and there was, and is now, no lien, mortgage or incumbrance of any nature upon any of said insured property, and no other person than the Assured has any interest therein, except mortgage to W. G. Wells (if there are any liens or incumbrances, state amounts and to whom payable).

The Affiant further declares that nothing has been done by or with the Assured's or his Affiant's privity or consent to violate the conditions of said policy, and that no articles are included in the annexed schedules that did not belong to the Assured and were not contained in the said buildings and damaged or destroyed by said fire, that no property saved has been concealed and that no attempt has been made to deceive the insurer in any manner as to the cause or extent of said loss.

And the Assured does hereby agree that any further information that may be required will be furnished on demand, and that the furnishing of this blank and / or the preparing of any schedules or statements of said loss by any representative of the insuring company is an act of courtesy to the Assured, and shall not be construed or pleaded as an admission of liability on its part or a waiver of any of the conditions of said policy.

KING LUMBER & MFG. CO.,

Assured,

Per — — — ,

Sec. & Gen. Mgr.

Dated at Nocatee, Fla., Dec. 16, 1912.

Subscribed and sworn to before me, a Notary Public, in and for the County of De Soto, State of Florida, the day and year next above written.

[SEAL.]

A. B. STROUD,

N. P.

My commission expires April 14, 1915.

EXHIBIT "D."*Schedule "A"—Policy Form.*

Below must be given a complete copy of the written or printed form describing the property insured, together with all clauses, endorsements and assignments, whether they are written on the policy or on forms attached thereto.

If policies are not concurrent, copies of all forms attached to the non-concurrent policies covering in whole or in part on the same property must also be attached hereto.

SCHEDULE "B" AND SCHEDULE "C."

Schedule "B." Statement of "Actual Cash Value" of Property Insured and Loss and Damage Thereto.

*Statement of Loss—King Lumber & Mfg. Company, Nocatee, Fla. Fire of November 27th, 1912, 11.15 A. M.
Cause, unknown; discovered on roof of veneer mill.*

Item 1.	Not involved.			
Item 2.	Machinery saw mill, value \$12,000.00—ins. Loss and damage, machinery in yard and Companies pay. ¾ value clause does not reduce payments.	\$8,500.00	475.00	.....
Item 3.	Not involved.			
Item 4.	Not involved.			
Item 5.	Veneer building, 64 x 145 x 28 ft. and additions. Cost to rebuild per estimate	\$4,724.38 1,181.09	3,543.29	2,500.00
	Less dep. 25% .....	.....	.....	.....
	Sound value and loss .....	.....	.....	.....
	Insurance and Companies pay ¾ value clause does not reduce payments.	.....	.....	.....
Item 6.	Veneer mill machinery. Total schedule, present prices. Less dep. 25% (6 yrs. old)	\$22,901.50 5,725.37	17,176.13 4,294.03	12,882.10
	Sound value and loss .....	.....	.....	.....
	Less ¼ for ¾ value clause .....	.....	.....	.....
Item 8.	Insurance, \$13,750.00, Companies pay. Boilers, sound value. Loss and damage in detail	\$4,500.00 526.40	500.00	.....
	Insurance \$500.00, Companies pay ¾ value clause does not reduce payment.	.....	.....	.....

Item 9.	Not involved.		
Item 10.	Not involved.		
Item 11.	Stock in cars, sheds, platforms, and in outside premises. Inventory in sheds before fire.	957.50	
	15000' lumber @ \$15.00	225.00	
	12000' logs and blocks @ \$10.	120.00	
	Blocks and board ends, fuel for sale.	50.00	
	Full capacity, stock in ten veneer racks @ \$139.	1,390.00	
	Lumber at mill, per inventory after fire:		
	30000' No. 3 common rough @ \$7.50	225.00	
	70000' Rough & dressed @ 14.00	980.00	
	Sound value.....	3,947.50	
	Value saved, per inventory.....	1,205.00	
		2,742.50	
	Loss and damage.....	2,742.50	
	Insurance \$2,500.00, Companies pay.....	3,158.00	
	Insurance required by 80% co-insurance clause.....	2,500.00	
	Actually carried.....		
	Assured co-insurer.....	658.00	
	The \$2,500.00 insurance pays.....	\$2,171.07	
	The \$658.00 co-insurance.....	571.43	
	Loss and damage.....	2,742.50	
	Not involved.		
Item 12.	Stock in veneer mill.		\$14,687.63
Item 13.	Inventory Nov. 1st, 1912.....		4,968.06
	Mds. per daily reports.....		
			19,655.69

Add stock in process, estimated
 Less sales, per books
 Less inventory in sheds
 Less inventory in W. Ho.

1,285.00
 20,940.69

8,783.50
 957.50
 7,453.54

17,194.54
3,746.15

Sound value and loss
 Insurance \$2,500.00, Companies pay
 80% co-insurance clause does not reduce payment.

Summary. Value. Loss. Insurance.

Item	2.	12,000.00	475.00	8,500.00
	5.	3,543.29	3,543.29	2,500.00
	6.	17,176.13	17,176.13	13,750.00
	8.	4,500.00	526.40	500.00
	11.	3,947.50	2,742.50	2,500.00
	13.	3,746.15	3,746.15	2,500.00

Total insurance \$43,750.00—all policies concurrent.
 \$1,000.00 Pays \$459.63.

21,028.17

King Lumber Company, Nocatee, Florida—Fire of November 27th, 1912.

Insurance and Apportionment.

Company and number.	Expiration.	Insures.	Pays.
56,312 American Union of Phila.	1—1—13	1,000.00	459.63
164,864 " " "	10—21—13	500.00	229.82
15,564 " Fire, Phila.	4—14—13	2,500.00	1,149.08
15,565 " "	4—27—13	2,500.00	1,149.08
57,301 Citizens, Baltimore	8—18—13	1,000.00	459.63
23,893 Federal Underwriters, D. C.	11—16—13	1,500.00	689.45
85,144 Fireman's Fund	3—25—13	3,500.00	1,608.72
129,856 " "	5—10—13	2,500.00	1,149.08
129,867 " "	9—28—13	1,500.00	689.45
129,847 " "	5—10—13	1,250.00	574.53
3,167 Hamburg Bremen	10—7—13	1,000.00	459.63
3,180 " "	10—27—13	1,500.00	689.45
716,522 National of Hartford	2—21—13	2,500.00	1,149.08
478,637 New Brunswick, N. J.	10—27—13	2,000.00	919.26
755,732 Nassau	2—26—13	1,500.00	689.45
2,202,265 National General, London	11—16—13	2,750.00	1,263.99
2,103,594 " "	11—18—13	3,750.00	1,723.63
2,103,595 " "	11—16—13	1,250.00	574.53
70,977 Palatine People's National, Phila.	4—21—13	1,500.00	689.45
197,702 " "	7—25—13	1,500.00	689.45
152,223 " "	5—8—13	1,250.00	574.53
51,691 Sun of N. O.	12—10—12	1,750.00	804.36
4,214,776 Scottish Un. N.			

4,322,843	"	"	10—19—13	1,750.00	804.36
4,191,690	"	"	5—19—13	1,500.00	689.45
3,754,931	London Assurance		2—12—13	1,000.00	459.63
Totals.				45,750.00	21,028.17

\$1,000.00 Pays \$459.63.

All policies concurrent, using printed form schedule.

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, Plaintiff,

VS.

AMERICAN FIRE INSURANCE COMPANY, Defendant.

Now comes the plaintiff, by Treadwell & Treadwell, its attorneys, and demurs to the second plea filed by defendant to plaintiff's declaration on the 29th day of October, A. D. 1914, and for substantial matters of law to be argued to the Court at the hearing thereof says:

First, that the matters and things set forth in said second plea do not constitute a defense to plaintiff's action against said defendant.

Second, the facts set up in said second plea are not sufficient to defeat plaintiff's cause of action against the defendant.

Third, and for other good and sufficient reasons appearing upon the face of said plea.

TREADWELL & TREADWELL,
Attorneys for Plaintiff.

We hereby certify that in our opinion the above and foregoing demurrer is well founded in law.

TREADWELL & TREADWELL,
Attorneys for Plaintiff.

STATE OF FLORIDA,
County of De Soto:

Before me, the undersigned authority, personally appeared E. D. Treadwell, who, on oath, says that he is one of the attorneys for the King Lumber & Manufacturing Company, and that the above and foregoing demurrer is filed in good faith and not for the purpose of delay.

E. D. TREADWELL.

Sworn to and subscribed before me on this 5th day of December A. D. 1914.

[SEAL.]

A. MARIE McCREADY,
Notary Public, State of Florida.

My Commission expires May 14, 1916.

12 On the 5th day of January, 1915, the plaintiff filed its replication to a portion of the defendant's first plea in the words and figures following, to-wit:—

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the King Lumber & Manufacturing Company, a corporation, by Treadwell & Treadwell, its attorneys, and for replication to that part of the first plea filed by defendant on the 29th day of October, 1914, beginning with the word "and" in the thirteenth line of said plea, says:

I.

That it is true that the two fire insurance policies sued on in this cause contain the warranty set out in said plea, but plaintiff states the fact to be that Lowry & Prince, the agents of the defendant, located at Tampa, Florida, solicited said insurance evidenced by said policies from plaintiff, and when the said Lowry & Prince, agents of said defendant, delivered said policies to plaintiff, the said agents of said defendant called plaintiff's attention to said warranty clause, and stated to plaintiff that said clause did not affect the plaintiff and should be disregarded by plaintiff, and the said Lowry & Prince, agents for the defendant, gave as their reason why plaintiff should disregard said warranty clause that plaintiff at the time had in the American Central Insurance Company of St. Louis, Missouri, Sixty-five Hundred (\$6500.00) Dollars of insurance covering the items insured by the policies of the defendant herein.

Repliant further says that it at the time was carrying a large amount of insurance, approximately about Forty-five Thousand (\$45,000.00) Dollars, in various companies, and that it did not keep up very closely with the amount of insurance that it had in
13 any particular company, it being careful only to keep the total amount of approximately \$45,000.00 in reputable, old line companies, and that at the time of the issuance of the policies sued on in this cause and the acceptance of the same by plaintiff, plaintiff did not know the exact amount of insurance it had in the American Central Insurance Company of St. Louis, Missouri, and that it therefore relied upon the representation of the agents of the defendant, who stated that they had investigated the policies and that plaintiff had in said American Central Insurance Company of St. Louis, Missouri, Sixty-five Hundred (\$6500.00) Dollars of insurance as aforesaid, on the items covered by the policies of the defendant.

Repliant further says that relying upon the representation of said agents of said defendant, and relying upon the instructions of the agents of said defendants to disregard said warranty, repliant accepted said policies and paid the agents of said defendant the premium thereon.

II.

Replying further to that portion of the first plea heretofore mentioned, repliant says:

That thereafter it was notified that a policy for Fifteen Hundred (\$1500.00) Dollars in the American Central Insurance Company of St. Louis, Missouri, was cancelled by an agency at Bartow, Florida. Repliant felt no apprehension as to violation of said warranty as it still had, according to the representations of the agents of defendant Five Thousand (\$5,000.00) Dollars insurance in the American Central Insurance Company of St. Louis, Missouri, on the property covered by the policies of the defendant.

Repliant further says that some time prior to July 25, 1912, Lowry & Prince, agents of said defendant, notified repliant that the American Central Insurance Company of St. Louis, Missouri, was desirous of cancelling its policy No. 303149 in the sum of Fifteen Hundred (\$1500.00) Dollars, and suggested to repliant that there

be substituted for the last mentioned policy a policy in a like
14 sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the agents of the defendant and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of said policy and the substitution of the policy in the People's National Fire Insurance Company of Philadelphia.

Repliant further says that some time prior to October 27, 1912, Lowry & Prince, agents of said defendant, notified repliant that the American Central Insurance Company of St. Louis, Missouri, was desirous of cancelling its policy No. 303192 in the sum of Fifteen Hundred (\$1500.00) Dollars, and said agents of said defendant suggested that there be substituted for the said last mentioned policy a policy in a like amount in the American Union of Philadelphia, and said information coming from the agents of said defendant, and said suggestion being by the agents of the said defendant, repliant agreed that said last mentioned policy might be cancelled and a policy in the American Union of Philadelphia substituted therefor.

Repliant further says that in pursuance of said suggestion as soon as the policies above mentioned were cancelled said new policies were substituted in pursuance of said suggestion. Repliant denies that said policies were cancelled without the knowledge of defendant and states the fact to be as heretofore set forth that said policies were cancelled with the full knowledge and consent of Lowry & Prince, who were the agents of said defendant, acting for it in the State of Florida, and who, as such agents, had caused the policies sued on to be issued, and who, as such agents, had collected the premiums paid by repliant for said policies sued on and forwarded the same to said defendant, and that said new policies in the companies hereinbefore mentioned were substituted for the two cancelled policies with the full knowledge and consent, and at the suggestion and with the approval of Lowry & Prince, agents of said defendant as aforesaid.

Repliant further says that the defendant at all times, through its agents Lowry & Prince, had knowledge of the cancellation of said policies of the American Central Insurance Company of St. Louis,

15 and the substitution therefor of the policies hereinbefore mentioned; that it did not object thereto but, through its agents Lowry & Prince, approved and ratified said cancellation and substitution.

III.

Further replying to that portion of the plea hereinbefore mentioned, repliant says that it is true that said policies of the American Central Insurance Company of St. Louis, Missouri, were cancelled as in and by said plea set forth, it states the fact to be that it immediately caused to be substituted therefor policies of insurance in an equal sum in other old line Insurance companies.

IV.

Repliants further replying to that portion of the first plea heretofore mentioned, says that it is true that the said fire insurance policies sued on contain the warranty clause set forth in said plea, but repliant states the fact to be that at the time of the issuance of said policies and at all times thereafter during the life of the same, there existed a general custom among fire insurance companies and in the insurance world that a warranty such as set forth in said plea was complied with if the amount mentioned in said warranty should be carried on said property in any reputable fire insurance company or old line fire insurance company.

Repliant further says that said general business custom was in force and effect in Tampa and at Nocatee, Florida, at the time of the issuance and acceptance of said policies, and remained in force and effect during the life of said policies.

Repliant further says that it is true that the policies of the American Central Insurance Company of St. Louis, Missouri, were cancelled, but that immediately and simultaneously like policies were issued on said property in the same amount as said cancelled policies in reputable fire insurance companies or old line fire insurance companies.

Repliant further says that it at all times, in accordance with said general custom carried the amount of insurance mentioned in said warranty clause in reputable old line fire insurance companies and that the same was carried against said property at the time of the fire.

TREADWELL & TREADWELL,
Attorneys for Repliant.

16 On the 11th day of January, 1915, the defendant filed its demurrer to the plaintiff's replications in the words and figures following, to-wit:—

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Plaintiff,

VS.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and demurs to the replications of the plaintiff to the first plea of the defendant, and demurs severally to each of the said replications, and says that the said replications, and each of them, are bad in substance, and as matters of law to be argued in support of the said demurrer states the following:—

As to all of said replications—

(1.) They are vague, indefinite, uncertain and loose in their allegations, and are not responsive to the plea.

(2.) They depend upon legal conclusions not justified by allegations of fact.

As to the 1st replication—

(1.) It seeks to vary by parol the terms of an express written contract.

(2.) Lowry and Prince were without power to bind the defendant as alleged.

(3.) It seeks to modify and contradict terms assented to as evidencing the contract between the parties.

As to the 1st and 2nd replications—

If the legal predicate for the conclusion that Lowry and Prince were the agents of the defendant rests upon Section 2765 of the General Statutes of Florida, and that Section should be construed to apply under the conditions set forth in the plea, the said Statute as so construed is in violation of the Constitution of the United States, and the defendant hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of Article 4 of the Constitution of the United States requiring that "Full Faith and Credit shall be given in each State to the public Acts * * * of every other State" in that the State of Florida will thereby deny full faith and credit to the laws of the State of Pennsylvania.

(b.) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of the Fourteenth Amendment to the Constitution of the United States providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".

(c.) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the Clause of the Fourteenth Amendment to the Constitution of the United States providing: "Nor shall any State deprive any person of life, liberty or property, without due process of law".

(d.) And the defendant further hereby specially sets up and claims that as so construed the said Statute is in violation of the

Clause of the Fourteenth Amendment to the Constitution of the United States providing that no State shall "deny to any person within its jurisdiction the equal protection of the laws".

(e.) The defendant hereby specially sets up and claims the benefit of all the foregoing provisions of the Constitution of the United States, and further specially sets up and claims the benefit of Article 6 of the Constitution of the United States providing that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding".

As to the 2nd replication—

(1.) Said replication does not allege any facts in issuable form and is a mere argument.

(2.) Assuming that Section 2765 could be construed so as to make Lowry and Prince agents of the defendant at the time the insurance was effected it could not constitutionally make them 18 agents of the defendant thereafter, so that notice to them, or acts done by them, thereafter would bind the defendant.

(3.) "Agents of said defendant" reiterated in the replication, and on which it depends, is a legal conclusion not supported by allegations of fact, and not justified by law when the replication is construed in connection with the plea.

(4.) The replication does not allege that Lowry and Prince were acting as agents of the defendant in respect to the matters set forth in the replication.

As to the 3rd replication:—

The subject matter thereof is wholly immaterial and irrelevant.

As to the 4th replication—

(1.) The custom set forth is repugnant to the express contracts.

(2.) The contracts were Pennsylvania contracts.

(3.) The subject matter of the replication is wholly immaterial and irrelevant.

JAMES F. GLEN,
Attorney for Defendant.

I hereby certify that I am the attorney for the defendant in the above stated cause and that in my opinion the foregoing demurrer as to all and each of the replications demurred to is well founded in law, and being duly sworn say that the said demurrer is not interposed for the purpose of delay.

JAMES F. GLEN.

Sworn to and subscribed before me this 9th day of January, A. D. 1915.

[*Seal.*]

R. A. SCOTTI,
Notary Public, State of Florida at Large.

19 On the 25th day of August, 1915, the Court made an order in the words and figures following, to-wit:—

Circuit Court, De Soto County.

KING LUMBER & MFG. CO.

vs.

AMERICAN FIRE INS. CO.

This cause coming on to be heard upon motion to strike, Demurrer to second amended plea and demurrer to replications and being of opinion that the issue in part tendered by the first amended plea was whether Lowery & Prince as broker for plaintiff procured the policy and that it was not business transacted in the state and that this is a material part of the plea, and that the question of agency is not res adjudicata, the judgment on that issue being only that Lowery & Prince were agents at time of service. But also that part of the issue tendered if true, that the contract was not made in this state, raises the material question whether the statute, under which that adjudication was had, has any applicability to contracts made out of state, and I am — opinion that the statute can only be applied to contracts made in the state, hence the plea is good as obviating the effect of the statute. The motion to strike must therefore be overruled. It is therefore unnecessary to comment further on the various grounds of demurrer to the 1st replication, than to say that it should be sustained if for no other reason than that it does not fully respond to plea by presenting a complete responsive issue; that is that the contract was not made out of the state by plaintiff's brokers but was a transaction in the state by an agent of defendant who waived warranty clause & etc. The replication as it now stands seems to assume the agency as a conclusion striking the first part of the plea, by reason of the statute. I must hold however that the statute is applicable or not, according to whether the transaction was had in the state by an agent here, in which case I would regard the matter claimed as waiver of insurance clause of warranty, good reply
20 to plea. The second and third replication is subject to same fault, tho not so much so. The fourth replication I think is bad because custom does not alter contracts, but only aids or explains ambiguities or omissions.

It is ordered that the motion to strike be overruled; demurrer to defendant's 2nd amended plea sustained; leave to amend in 15 days, after notice hereof; demurrer to replications sustained; leave to amend in 15 days after notice hereof. Exceptions noted for both parties.

F. A. WHITNEY,
Judge.

August 25, 1915.

On the 2nd day of October, 1915, the plaintiff filed its amended replication in the words and figures following, to-wit:—

In the Circuit Court of the Tenth Judicial Circuit of the State of Florida, in and for De Soto County.

KING LUMBER & MANUFACTURING CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the King Lumber & Manufacturing Co., a corporation, by Treadwell & Treadwell, its attorneys, and for amended replication to the first plea filed by defendant on the 29th day of October, A. D., 1914, says:

First. That it denies that at the time said policies went in force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, defendant was transacting business within the State of Florida, and was in fact transacting business with plaintiff.

That on Apr. 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies 21 sued on herein, and that the said policy of Apr. 14, 1908, so written by said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with the said Lowry and Prince as to the nature of the risk assumed, and from time to time, from Apr. 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject.

And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no Agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

Second. For a further replication to said first plea, repliant says
that it is true that the two fire insurance policies sued on in
22 this cause contained the warranty set out in said plea. Repli-
pliant states the fact to be that Lowry & Prince, the Agents of
the defendant as aforesaid, when they delivered the policies so sued
on to repliant, called repliant's attention to said warranty clause, and
stated to repliant that said clause would not affect repliant, and
should be disregarded by repliant, and gave as their reason why said
warranty clause should be disregarded, that the repliant had at that
time in the American Central Insurance Company of St. Louis, Mo., Six
Thousand Five Hundred Dollars (\$6,500.00) of insurance covering
the items insured by the policies of the defendant sued on
herein.

Repliant further says that it at that time was carrying a large
amount of insurance, approximately Forty Five Thousand Dollars
(\$45,000.00) in various companies, and that it did not keep up very
closely with the amount of insurance that it had in any particular
company, being careful only to keep the total amount approximately
Forty Five Thousand Dollars, in reputable old line companies, and
that it therefore relied upon the representation of the said Lowry &
Prince, who stated that they had investigated the policies of repliant
in the said American Central Insurance Company of St. Louis, and
that repliant had Six Thousand Five Hundred Dollars of insurance,
as aforesaid.

Repliant further says that relying upon the representation of said
Lowry & Prince, Agents of the said defendant, and relying upon
their instruction to disregard said warranty, repliant accepted said
policies, and paid the said Lowry & Prince the premium therefor,
charged by the said defendant.

Third. Replying further to said first plea, repliant says:
That some time prior to July 25, 1912, Lowry & Prince, as Agents
of the defendant aforesaid, notified repliant that the American Cen-
tral Insurance Company of St. Louis, Mo., was desirous of cancelling
its policy #303149, in the sum of One Thousand Five Hundred
Dollars (\$1,500.00) and suggested to repliant that there be substi-
tuted for the last mentioned policy, a policy in a like sum in the
People's National Fire Insurance Company of Philadelphia.

23 This information coming from the said Lowry & Prince, the
Agents of the defendant, and this suggestion having been
made by the agents of the defendant, repliant agreed to the can-
cellation of said policy, and the substitution of a policy with the
People's National Fire Insurance Company of Philadelphia.

Repliant further says that some time prior to Oct. 27, 1912, the
said Lowry & Prince, the Agents as aforesaid of the said defendant
notified repliant that the American Central Insurance Company of
St. Louis, Mo., was desirous of cancelling its policy #303192, in the
sum of One Thousand Five Hundred Dollars (\$1,500.00) and the
said Lowry & Prince suggested that there be substituted for the said
last mentioned policy, a policy in a like amount in the American
Union of Philadelphia.

Said information and said suggestion being given by the Agents
of said defendant as aforesaid, repliant agreed that said last men-

tioned policy might be cancelled, and a policy in the American Union of Philadelphia substituted therefor.

Repliant further says that the said Lowry & Prince, Agents of the said defendant as aforesaid, assured repliant that the cancellation of policies above mentioned was not a violation of the warranty set forth in said plea, provided a like amount of insurance was carried in some other old line insurance company.

Repliant further says that as soon as said policies were cancelled, new policies were substituted in pursuance of said suggestion, in the companies above mentioned, and repliant therefore denies that said policies were cancelled without the knowledge of defendant, but says that said policies were cancelled with the full knowledge and consent, and at the suggestion of Lowry & Prince, who were the Agents of said defendant as aforesaid, acting for it in the State of Florida, who, as such agents, had caused policies sued on to be issued, and who had collected the premiums paid by repliant for said policies sued on, and forwarded the same to the said defendant, and that said defendant thereby waived said warranty clause, ratified and confirmed the cancellation of said policies of insurance in the American Central Insurance Company of St. Louis.

24 Fourth. Further replying to said first plea, repliant denies that said policies of insurance so sued on, were delivered in the State of Pennsylvania, but states the fact to be that same were delivered by Lowry & Prince, as Agents for said defendant, to repliant, within the State of Florida, and accepted by repliant within said State.

TREADWELL & TREADWELL,
Attorneys for Plaintiff.

On the 2nd day of October, 1915, the defendant filed its rejoinder to the plaintiff's replications in the words and figures following to-wit:

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the defendant, American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and for a rejoinder to the replications of the plaintiff, says:—

That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania, and in April 1908, at Philadelphia, in the State of Pennsylvania, Lowry & Prince of Tampa, Florida, with whom the defendant had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and

thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia in the State of Pennsylvania, the defendant continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of the said policies were written and executed by
25 the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince, at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry and Prince to the defendant to be made by them because they were agents for that company and would know of any cancellations by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contract sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of \$45,750, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies that by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince, for the defendant, any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that, prior to the furnishing of the proofs of loss

26 by the plaintiff, it had any notice or knowledge that the American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry \$5,000 on the identical subject matter and risk, and denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon.

JAMES F. GLEN,
Attorney for Defendant.

On the 4th day of October, 1915, the plaintiff filed its demurser to the plaintiff's rejoinder in the words and figures following, to-wit:

In the Circuit Court of the Tenth Judicial Circuit, in and for De Soto County, Florida.

KING LUMBER & MFG. CO., a Corporation, Plaintiff,

vs.

AMERICAN FIRE INSURANCE CO., a Corporation, Defendant.

Now Comes the King Lumber & Mfg. Co., by Treadwell & Treadwell, its attorneys, and demurs to the Rejoinder filed by the defendant to the plaintiff's Replication to the defendant's plea, and says:

That said Rejoinder is bad in substance and as matters of law to be argued and urged in support of said Demurrer, states the following:

First. The matters and things set forth in said Rejoinder are not such as constitutes a defense to the cause of action urged by plaintiff in its Declaration, and the Replication filed by plaintiff to defendant's Plea.

Second. Said Rejoinder shows upon its face that the defendant at the time of the cancellation of the policies of insurance in the American Central Insurance Company of St. Louis, was doing business within the State of Florida, and that Lowry & Prince were its agents.

Third. Because the facts set forth in said Rejoinder are not sufficient in law as an answer to the matters and things set forth in plaintiff's Replication to defendant's plea.

Fourth. For other good and sufficient reasons, appearing
27 on the face of said Rejoinder.

TREADWELL & TREADWELL,
Attorneys for Plaintiff.

We hereby certify that we are attorneys for the King Lumber & Mfg. Co., and that in our opinion the foregoing demurrer is well founded in law.

TREADWELL & TREADWELL,
Attorneys for King Lumber & Mfg. Co.

STATE OF FLORIDA,
County of De Soto:

Before me the undersigned authority, an officer duly authorized to administer oaths, personally appeared E. D. Treadwell, who on oath says that he is attorney for the King Lumber & Mfg. Co., and that the above and foregoing demurrer is filed in good faith, and not for the purpose of delay.

E. D. TREADWELL.

Sworn to and subscribed to before me on this fourth day of October, A. D., 1915.

[SEAL.]

MARY A. MOYE,
Notary Public.

My commission expires Dec. 18, 1918.

Demurrer sustained leave to amend if so desired.

F. A. WHITNEY,
Judge.

June 27—16.

28 On the 27th day of June, 1916, the Court entered judgment sustaining the plaintiff's demurrer to the defendant's rejoinder and rendering final judgment for the plaintiff in the words and figures following, to-wit:

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

This cause coming on to be heard upon the demurrer of the plaintiff to the rejoinder of the defendant to the plaintiff's replication and having been argued by counsel for the respective parties and submitted to the Court and the Court having considered the same, and the Court being of the opinion that the provisions of Section 2765 of the General Statutes of Florida are applicable and that under the said provisions the firm of Lowry and Prince must be held to be the agents of the defendant, it is, therefore, considered by the Court that the said demurrer be and the same is hereby sustained, and the defendant not desiring to plead further, it is further considered by the Court that final judgment on the said demurrer be and the same is hereby rendered in favor of the plaintiff for its damages.

And it further appearing to the Court on inquest of damages that there is due and owing on the policies sued on the sum of \$2,298.16, with interest thereon at the rate of eight per cent., per annum, from February 16th, 1913, and that the sum of \$300.00 would be a reasonable attorneys' fee to the attorneys of the plaintiff, it is, therefore, considered by the Court that the plaintiff, King Lumber & Manufacturing Company, a corporation, do have and recover of and from the defendant, American Fire Insurance Company, a corporation, the sum of \$2,916.10, for its damages, together with the further sum of \$300.00 for reasonable attorneys' fee, and also its costs in this behalf expended, to be taxed by the Clerk of this Court, and that

29 execution therefor do issue, to be levied on the goods, chattels, lands and tenements of the defendant and unto the plaintiff rendered.

Done and ordered at Arcadia, Florida, this 27th day of June, A. D. 1916.

F. A. WHITNEY,
Judge.

On the 30th day of June, 1916, the plaintiff filed its writ of error, which was on the same day duly recorded, in the words and figures following, to-wit:

STATE OF FLORIDA, ss:

The State of Florida to the Judge of the Circuit Court of the Tenth Judicial Circuit of the State of Florida in and for De Soto County, Greeting:

Because in the record and proceedings and also in the rendition of judgment in a certain cause which is in our said Circuit Court before you, between King Lumber and Manufacturing Company, a corporation, as Plaintiff and The American Fire Insurance Company, a corporation, as Defendant, manifest error hath happened, as it is said, to the great damage of the said The American Fire Insurance Company as by its complaint appears,

We, willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein rendered, you distinctly and openly send the record and proceedings aforesaid with all things touching them, under your seal, together with this writ, to our Supreme Court of the State of Florida, so that you have the same at Tallahassee on the 28th day of August, A. D. 1916, in our said Supreme Court to be then and there held, that inspecting the record and proceedings aforesaid, our said Supreme Court may cause further to be done therein, to correct that error, what of right and according to law should be done.

Witness the Honorable R. Fenwick Taylor, Chief Justice of the said Supreme Court, and the seal of the said Circuit Court, this 30th day of June in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.]

A. L. DURRANCE,

Clerk of the Circuit Court of De Soto County, Florida.

On the —th day of July, 1916, the defendant filed its assignment of errors in the words and figures following, to wit:—

Tenth Judicial Circuit of Florida, Circuit Court of De Soto County.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Plaintiff,

vs.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Defendant.

Now comes the defendant, American Fire Insurance Company, a corporation, by James F. Glen, its attorney, and hereby makes the following as a complete assignment of the errors it intends to rely upon in the Supreme Court of Florida for reversal of the judgment entered against it in the above stated cause, on the 27th day of June, A. D. 1916, on its writ of error sued out therefrom, viz.,

1st. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied full faith and credit

to the laws of the State of Pennsylvania, in violation of Section 1 of Article IV of the Constitution of the United States.

2nd. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunitiies of citizens of the United States".

3rd. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "nor shall any State deprive any person of life, liberty or property, without due process of law".

31 4th. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall deny to any person within its jurisdiction the equal protection of the Laws".

5th. The Court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied to the defendant the benefit of Article VI of the Constitution of the United States which provides that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding".

6th. The Court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the said rejoinder was a complete answer to the plaintiff's replications.

7th. The Court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the replications of the plaintiff were bad, and judgment should have been rendered against it on that ground.

8th. The Court erred in holding that the plaintiff could secure reformation of the policies sued on in a Court of Law.

9th. The Court erred in holding that Lowry and Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff.

10th. The Court erred in holding that the plaintiff could recover upon different causes of action from those set up in its declaration.

11th. The Court erred in sustaining the demurrer of the plaintiff to the defendant's second plea.

JAMES F. GLEN,
Attorney for Defendant.

82 And thereafter, to-wit, on the 12th day of October, A. D. 1916, the said cause was submitted to the said Supreme Court of Florida upon briefs for the respective parties.

And thereafter, to-wit, on the 20th day of October, A. D. 1917, the said Supreme Court of Florida did render and file its opinion and judgment in the above styled cause, the said opinion and dissenting opinion filed therewith being in the words and figures following, to-wit:

33 In the Supreme Court of Florida, June Term, A. D. 1917,
De Soto County.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in
Error,

v.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation,
Defendant in Error.

Statement.

We copy the following statement from the brief of the plaintiff in error, which the defendant in error says in its brief is "a fair and correct statement of the pleadings which made up the issues in the case that was tried before the court below and which is now before this court for its consideration."

"The King Lumber and Manufacturing Company, hereinafter referred to for the sake of convenience as the Manufacturing Company, sued the American Fire Insurance Company, hereinafter referred to as the Insurance Company, upon two policies of insurance. The policies as well as the proofs of loss submitted were made parts of the declaration, from which it appears that there were twelve separate items insured, of which loss is claimed only on account of items numbered Two, Five, Six, Eight, Eleven and Thirteen. It further appears that there was total concurrent insurance on the property to the amount of Forty-five Thousand, Seven Hundred and Fifty (\$45,750.00) Dollars, and the policies contain the usual pro rata agreement in such cases.

"Item Five is a building the insurable value of which is fixed at Twenty-five Hundred (\$2500.00) Dollars. Items Two, Six and Eight relate to machinery, tools, boilers, etc. Items Eleven and Thirteen relate to manufactured product on hand.

34 "To the declaration the defendant filed two pleas as follows:

"1. That at the time of the execution and delivery of the policies sued on, and each of them, and at the time the said policies went into force, the defendant was a corporation organized and existing under the laws of the State of Pennsylvania, and was not engaged in the transaction of business in the State of Florida, and had not secured a permit to do business in the State of Florida as a fire insurance company, and had no agent or representative in the State of Florida, and the said policies were made, executed and delivered in the State of Pennsylvania, and secured in the State of Pennsylvania by the plaintiff through the firm of Lowry and Prince of Tampa, Florida, as brokers of the plaintiff, and the defendant required to be inserted in and stamped on the face of the said policies a provision in the

following words, to-wit: "Warranted same gross rate, terms and conditions as and to follow the American Central Ins. Co., of St. Louis, Mo., and that said company has, throughout the whole time of this policy, at least \$5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void," and prior to the time of the alleged loss in the said declaration mentioned, but without the knowledge of the defendant, the said American Central Ins. Co., of St. Louis, Mo., had cancelled its policies on the property insured, and at the time of the loss alleged did not carry \$5,000 or any other amount on the identical subject matter and risk, and prior to the institution of suit the defendant requested of the plaintiff the date of the cancellation by the said American Central Ins. Co., of St. Louis, Mo., of its insurance on the premises, and offered to refund the unearned portion of the premiums on the policies sued on from the date of such cancellation, but the plaintiff failed and refused to furnish or give to the defendant the date of such cancellation, and the defendant hereby tenders and offers to pay to the plaintiff the 35 amount of the unearned premiums from the date of such cancellation upon being advised of the date thereof, of which the defendant is now ignorant.

"2. And for a second and further plea the defendant says: that at the time of the execution and delivery of the policies sued on, and each of them, and at the time the said policies were expressed to go into force, and at the time of the plaintiff's loss, the entire property insured, including all of the personal property insured, was subject to and encumbered by the mortgage to W. G. Welles set forth in the plaintiff's proofs of loss, annexed to the said declaration, on which there was due a large sum of money, the existence of which mortgage was unknown to the defendant until the said proofs of loss were furnished it, whereby the said policies, according to the terms thereof, became null and void."

"The plaintiff filed a demurrer to the second plea, which the court sustained, and replications to the first plea, to which the court sustained a demurrer. Plaintiff then filed the following amended replications:

"First. That it denies that at the time the said policies went into force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, the defendant was transacting business within the State of Florida, and was in fact transacting business with the plaintiff. That on April 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of April 14, 1908, so written by the said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted 36 with Lowry & Prince as to the nature of the risk assumed and from time to time, from April 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the

physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject. And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

"Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no agent or representative in the State of Florida, but states the fact to be that Lowry & Prince who procured and caused said policies to be written, who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

"Second. For a further replication to said first plea, repliant says that it is true that the two fire insurance policies sued on in this cause contained the warranty set out in said plea. Repliant states the fact to be that Lowry & Prince, the agents of the defendant as aforesaid, when they delivered the policies so sued on to repliant, called repliant's attention to said warranty clause, and stated to repliant that said clause would not affect repliant, and should be disregarded by repliant and gave as their reasons why said warrant clause should be disregarded, that the repliant had at that time in the American Central Insurance Company of St.

37 Louis, Mo., Six thousand five hundred (\$6,500.00) dollars of insurance, covering the items insured by the policies of the defendant sued on herein.

"Repliant further says that it at that time was carrying a large amount of insurance, approximately Forty-five Thousand (\$45,000.00) Dollars in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, being careful only to keep the total amount approximately Forty-five Thousand Dollars, in reputable old line companies, and that it therefore relied upon the representation of the said Lowry & Prince, who stated that they had investigated the policies of repliant in the said American Central Insurance Company of St. Louis, Mo., and that repliant had Six Thousand Five Hundred Dollars of insurance, as aforesaid.

"Repliant further says that relying upon the representation of said Lowry & Prince, agents of the said defendant, and relying upon their instructions to disregard said warranty, repliant accepted said policies, and paid the said Lowry & Prince the premium therefor, charged by the said defendant.

"Third. Replying further to said first plea repliant says: That sometime prior to July 25, 1912, Lowry & Prince, as agents of the

defendant aforesaid, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #308149, in the sum of One Thousand Five Hundred (\$1,500.00) Dollars and suggested to repliant that there be substituted for the last mentioned policy, a policy in a like sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the said Lowry & Prince, the agents of the defendant, and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of the said policy, and the substitution of a policy with the People's National Fire Insurance Company of Philadelphia.

"Repliant further says that sometime prior to October 27, 1912,
the said Lowry & Prince, the agents as aforesaid of the said
38 defendant, notified repliant that the American Central In-
surance Company of St. Louis, Mo., was desirous of cancelling
its policy #308192, in the sum of One Thousand Five Hundred
(\$1,500.00) Dollars and the said Lowry & Prince suggested that
there be substituted for the said last mentioned policy, a policy in a
like amount in the American Union of Philadelphia. Said informa-
tion and said suggestions being given by the agents of said defendant
as aforesaid, repliant agreed that said last mentioned policy might be
cancelled, and a policy in the American Union of Philadelphia sub-
stituted therefor.

"Repliant further says that the said Lowry & Prince, agents of
the defendant as aforesaid, assured repliant that the cancellation of
the policies above mentioned was not a violation of the warranty set
forth in said plea, provided a like amount of insurance was carried
in some other old line insurance company.

"Repliant further says that as soon as said policies were cancelled,
new policies were substituted in pursuance of said suggestion, in the
companies above mentioned, and repliant therefore denies that said
policies were cancelled without the knowledge of the defendant,
but says that said policies were cancelled with the full knowledge
and consent, and at the suggestion of Lowry & Prince, who were
agents of said defendant as aforesaid, acting for it in the State of
Florida, who, as such agents, had caused policies sued on to be
issued, and who had collected the premiums paid by repliant for
said policies sued on, and forwarded the same to the said defendant,
and that said defendant thereby waived said warranty clause, rat-
ified and confirmed the cancellation of said policies of insurance in
the American Central Insurance Company of St. Louis.

"Fourth. Further replying to said first plea, repliant denies that
said policies of insurance so sued on, were delivered in the State of
Pennsylvania, but states the fact to be that same were delivered by
Lowry & Prince, as agents for said defendant, to repliant, within the

State of Florida, and accerted by repliant within said State.
39 "Defendant thereupon filed a rejoinder as follows:
 "Under the public laws of the State of Pennsylvania,
which are entitled to full faith and credit in the State of Florida, the
defendant is authorized to write and issue, in the State of Pennsyl-
vania, policies of insurance on property outside the State of Pennsyl-
vania, and in April, 1908, at Philadelphia, in the State of Pennsyl-
vania, Lowry & Prince of Tampa, Florida, with whom the defendant

had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia, in the State of Pennsylvania, the defendant continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of said policies were written and executed by the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry & Prince to the defendant to be made by them because they were agents for that company and would know of any cancellation by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account,
40 to waive any provisions in the contracts sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of \$45,750.00, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince for the defendant, any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that, prior to the furnishing of proofs of loss by the plaintiff, it had any notice or knowledge that the American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry \$5,000 on the identical subject matter and risk, and denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon.'

"The court sustained a demurrer to the rejoinder and rendered final judgment thereon in favor of the plaintiff for the sum of Three Thousand, Two Hundred, Sixteen and 10/100 (\$3,216.10) Dollars, from which this writ of error is prosecuted.

"The court in its judgment found that the provisions of Section 2765 of the General Statutes applied and made Lowry & Prince agents of the defendant, and that was the basis of its judgment.

"The assignment of errors is as follows:—

41 "1st. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied full faith and credit to the laws of the State of Pennsylvania in violation of Section 1 of Article IV of the Constitution of the United States.

"2nd. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

"3rd. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "nor shall any State deprive any person of life, liberty or property, without due process of law."

"4th. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, violated the provision contained in the Fourteenth Amendment to the Constitution of the United States which provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws."

"5th. The court by holding that Section 2765 of the General Statutes of Florida applied to the contracts of insurance sued on, which were made in the State of Pennsylvania, denied to the defendant the benefit of Article VI of the Constitution of the United States which provides that "the Judges in every State shall be bound thereby anything in the Constitution or Laws of any State to the contrary notwithstanding."

42 "6th. The court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the said rejoinder was a complete answer to the plaintiff's replication.

"7th. The court erred in sustaining the demurrer of the plaintiff to the rejoinder of the defendant on the ground that the replications of the plaintiff were bad, and judgment should have been rendered against it on that ground.

"8th. The court erred in holding that the plaintiff could secure reformation of the policies sued on in a Court of Law.

"9th. The court erred in holding that Lowry & Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff.

"10th. The court erred in holding that the plaintiff could recover upon different causes of action from those set up in its declaration.

"11th. The court erred in sustaining the demurrer of the plaintiff to the defendant's second plea."

48 This opinion by direction of the Court was prepared by Mr. Justice Shackleford, and approved by a majority of the Court, before his resignation. After that event it was again considered and readopted.

PER CURIAM:

We shall treat the first five assignments of error together, as they have been so discussed by the plaintiff in error, hereinafter referred to as the defendant, and the defendant in error, hereinafter referred to as the plaintiff, who concur in stating that all of such assignments "present questions arising under the Constitution of the United States." The first point which they present for our determination is whether the contracts declared upon, evidenced by the two policies of insurance, are Florida contracts, as contended by the plaintiff, or Pennsylvania contracts, as the defendant contends.

Section 2765 of the General Statutes of 1906, Compiled Laws of 1914, referred to in such assignments, reads as follows:

"Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed, to all intents and purposes, an agent or representative of such company, association, firm or individual."

This section originally formed Section 7 of Chapter 1863 of the Laws of Florida, (Acts of 1872, p. 12) was brought forward 44 as Section 2224 of the Revised Statutes of 1892, and was amended by Chapter 4380 of the Laws of Florida, (Acts of 1895, p. 147). We also think that it is advisable to copy Section 2777 of the General Statutes of 1906, Compiled Laws of 1914, which originally formed Section 3 of Chapter 4677 of the Laws of Florida, (Acts of 1899, p. 34), and is as follows:

"Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

We are not sure that we fully comprehend the argument made by the learned counsel for the defendant in support of these assignments, but, as we understand it, he does not attack the constitutionality of Section 2765 or contend that it is not operative within the State of Florida or controlling as to Florida contracts. These two quoted statutes, sections 2765 and 2777, make no discrimination between domestic and foreign insurance companies, as was attempted to be done by the statutes considered and discussed in *State ex rel. Hoadley v. Board of Insurance Commissioners of Florida*, 37 Fla.

564, 20 South. Rep. 772, 33 L. R. A. 288, but all insurance companies doing business within the State, whether incorporated or not, domestic or foreign, are placed upon the same footing and enjoy equal privileges and immunities. The defendant contends that the Circuit Court erroneously held that such section 2765 applied to the contracts of insurance sued on, which, it is averred, were made in the State of Pennsylvania. It is undoubtedly true, as is argued by the defendant and which the plaintiff admits, that a State may not extend the operation of its statutes beyond its borders into the jurisdiction of other States. As was said by Mr. Chief Justice White in *New York Life Insurance Co. v. Head*, 234 U. S. 149, text 161, Sup. Ct. Rep. —, which language is quoted and relied upon by the defendant, in discussing "the power of the State of Missouri to extend its authority into the State of New York." "Such question, we think, admits of but one answer since it would be

45 impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause. It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer v. Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power."

Neither the Legislature nor the courts of Florida could extend the operation of its statutes beyond its borders, and this is likewise true of Pennsylvania. The Legislature of Florida would seem to have made no such attempt. The question which we are called upon to answer is did the Circuit Court attempt to extend the operation of these two statutes into the State of Pennsylvania? The answer to be given to this question depends upon whether the contracts of insurance must be held to be Florida or Pennsylvania contracts. Conceding the truthfulness of the averment in the first plea of the defendant that such defendant corporation, organized and existing under the laws of Pennsylvania, "had not secured a permit to do business in the State of Florida," in accordance with the statutory requirements, if, as a matter of fact, such defendant did voluntarily engage in the transaction of insurance business within the State of Florida, such defendant is as amenable to the provisions of Sections 2765 and 2777 as though it had been incorporated under the laws of Florida or had secured a permit to do business within such State as a fire insurance company.

See Sections 4 and 5 of Chapter 5717 of the Laws of Florida, (Acts of 1907, p. 231), Sections 2682d and 2682e of Compiled Laws of 1914, and Ulmer v. First National Bank of St. Petersburg, 61 Fla. 460, 55 South. Rep. 405, wherein the former section was quoted and discussed and which section was amended by Chapter 6876 of the Laws of Florida, (Acts of 1915, Vol. 1, p. 162.). It is true that such plea further avers that the defendant "had no agent or representative in the State of Florida and the said policies were made, executed and delivered in the State of Pennsylvania, and secured in the State of Pennsylvania by the plaintiff through the firm of Lowry & Prince of Tampa, Florida, as brokers of the plaintiff." In the amended replications to this plea the following allegations are contained:

"First. That it denies that at the time said policies went in force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, defendant was transacting business within the State of Florida, and was in fact transacting business with plaintiff.

"That on Apr. 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by a policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of Apr. 14, 1908, so written by said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with the said Lowry & Prince as to the nature of the risk assumed, and from time to time, from Apr. 14,

47 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon and relied upon the said Lowry & Prince for its information on this subject.

"And repliant further shows that the said Lowry & Prince caused the defendant to write the said policy of 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant.

"Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no Agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written

who collected the premiums and forwarded the same to the defendant, were the agents of the defendant."

In its rejoinder to the amended replications, which rejoinder and amended replications are copied in full in the prefatory statement to this opinion, the defendant admits the issuance of a policy by it on the property of the plaintiff situate in Florida in April, 1908, and that "the defendant continued to write and issue policies of insurance on the plaintiff's properties, including those sued upon," upon the written request of Lowry & Prince, as brokers of the plaintiff, but avers that "with whom the defendant had no connection or relations." The rejoinder further avers that Lowry &

48 Prince "transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission." The defendant then proceeds to add the following denial: "and the defendant denies that by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince, for the defendant any premiums on the policies of insurance, written by the defendant, and denies that Lowry & Prince were agents of the defendant," and concludes its rejoinder as follows: "And denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject-matter insured, and the Companies carrying insurance thereon."

We deem it proper to call attention to the fact that the defendant begins its rejoinder with the statement, upon which it strongly relies, "That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania."

The rejoinder was filed to all of the amended replications and the demurrer interposed by the plaintiff was addressed to the entire rejoinder, which demurrer was sustained as an entirety. See Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 South. Rep. 687, and authorities there cited. For a proper understanding of these pleadings reference should be had to them in the prefatory statement. We have given extracts from them here merely as a matter of convenience and to render this opinion the more readily intelligible.

We have repeatedly held that every pleading is to be most strictly construed against the pleader thereof, that it is the first essential of good pleading that it be characterized by certainty, which 49 quality is especially requisite in replications and rejoinders. See Hillsborough Grocery Co. v. Leman, 62 Fla. 208, 56 South. Rep. 684, wherein we discussed what should characterize a rejoinder which admits the correctness of certain statements in the replication but seeks to avoid the same. We have also held that where a pleading has on its face two intendments, it must be con-

strued most strictly against the party who pleads it. *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 South. Rep. 781. We have also held, where there are inconsistent or contradictory allegations or averments in a pleading, that such pleading would be tested by the weaker, rather than by the stronger, allegations or averments. We have likewise held that, where there are contradictory, repugnant or inconsistent statements in a pleading, such statements would have the effect of neutralizing each other and that such pleading would be held bad on demurrer. See *Hoopes Bros. v. Crane*, 56 Fla. 395, 47 South. Rep. 992, and *State v. Seaboard Air Line Ry.*, 56 Fla. 670, 47 South. Rep. 986. We have further held that a demurrer interposed to a pleading admits the truth of all such matters of fact as are well and sufficiently pleaded, but allegations or averments of mere conclusions of law are not admitted by a demurrer, for the law is to be ascertained by the court. *Brown v. Avery*, 63 Fla. 355, 58 South. Rep. 34, Ann. Cas. 1914A 90.

Although Lowry & Prince were acting as brokers for the plaintiff in procuring insurance upon its property, it might also be true that, by virtue of what was actually done by them and the defendant in such transaction the law would also hold them to be the agents of the defendant. That Lowry & Prince could act in the dual capacity of insurance brokers for the plaintiff in procuring insurance upon its property and also as agents for the defendant insurance company there can be no question. See *Hooper v. State of California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, in which the opinion was rendered by Mr. Justice White, and from which we take the following excerpt: "The admission that the insurance was procured for the resident from a foreign company, which had no agent in the State, does not exclude the possibility of its having been procured within the State. If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute."

50 "The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about 'the meeting of their minds,' which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. *How v. Union Mut. Life Ins. Co.*, 80 N. Y. 32; *Monitor Mut. Ins. Co. v. Young*, 111 Mass., 537; *Hartford Ins. Co. v. Reynolds*, 36 Michigan, 502

"Domat thus defines his functions: 'The engagement of a broker is like to that of a proxy, a factor, or other agent; but, with this difference, that the broker, being employed by persons who having opposite interests to manage, he is, as it were, agent both for the one and the other to negotiate the commerce and affair in which he concerns himself. Thus, his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them entrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally.' 1 Domat, bk. 1, tit. 17, Sec. 1, Strahan's trans.

"Story says this statement of the functions of a broker is 'a full

and exact description according to the sense of our law.' Story's Agency, 31, note 3, 9th ed.

"If the contention of the plaintiff in error were admitted the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a

substantial and valuable power by a state government depend
51 not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable.

"The facts found here enforce the correctness of these views, and illustrate the evil which the statute was doubtless intended to prevent.

"Johnson & Higgins were average adjusters and brokers in New York City. Hooper, the plaintiff, as their agent, had a place of business in San Francisco. As such broker he applied for the insurance to his principals in New York City; the policy came to San Francisco for delivery, and the premium was there paid."

Also see John R. Davis Lumber Co. v. Hartford Fire Insurance Co., 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131, wherein it was held as follows: "Although sec. 1977, R. S., declares that whoever solicits or procures insurance from an insurance company on behalf of another, or makes any contract for insurance, or collects any premium, etc., shall be held to be an agent of such insurance company 'to all intents and purposes,' it cannot be construed to prevent an insurance broker employed to procure insurance for another from being the agent of the assured at the same time in procuring the policy; and the same rule applies as in other agencies, that the principal is bound by the acts and representations of the agent within the scope of his authority. Where the two relations conflict, the statute must prevail."

We call especial attention to the similarity of the Wisconsin statute, quoted in the opinion rendered by Mr. Justice Marshall in the cited case, to our own statute, Section 2765 of the General Statutes of 1906, which we have copied above. Also see Schomer v. Hekla Fire Insurance Co., 50 Wis. 575, 7 N. W. Rep. 544, wherein was discussed

the origin, history and object of the Wisconsin statute, which
52 is cited and quoted from with approval in John R. Davis Lumber Co. v. Hartford Fire Insurance Co., supra. We find from the strong opinion rendered by Mr. Chief Justice Cole in Schomer v. Hekla Fire Insurance Co., supra, wherein the Wisconsin statute would seem to have been construed for the first time, that Section 1977 of the Revised Statutes of Wisconsin, therein being considered, was a combination or union of several statutes, which are given. As was said in the opinion: "It seems to be designed in the clearest manner to make the company responsible to the public for the acts of one whom it permits to solicit insurance on its behalf, or who receives applications for insurance, makes, or aids in making, contracts

of insurance, or transacts the business, whether such person has in fact authority to act for it or not. The law imposes upon the company the duty of seeing to it that none but its regular authorized agents shall do its business or deal with the public. It is certainly not difficult for an insurance company to say to its local agents that they alone must transact its business; that they must in all cases deal directly with the insured in making insurance contracts, and not allow the interference of any stranger in its business, for whose acts it does not wish to be held responsible. That this is the plain object and intent of the statute we have no doubt. And, where the insurance company issues a policy in a case where a person has assumed the right to act for and represent it in making the contract, it must abide by the consequences and meet the liability which the statute imposes upon it." As had been previously stated therein: "Now it is difficult to imagine what object this provision was intended to accomplish, or what purpose subserve, if it has not the effect, under the circumstances, to make Lawson the agent of the defendant in the transaction. His acts, certainly, bring him within both the letter and spirit of the law. He was the only real actor for the defendant in making the contract; pro hac vice he assumed to represent, and did represent, the company in the matter; he received the applica-

tion, settled with the insured the rate and terms of insurance, delivered to them the policy, collected the premiums, and shared in the commission. In fact, he did everything that was done on behalf of the company, except the mere act of countersigning the policy. He was the only person the plaintiffs dealt with; they knew no other agent in effecting the insurance; they were totally ignorant of his relation to the defendant, or of his want of authority to represent and act for it. It is idle to contend that he did not in any manner aid or assist in making the contract for the company, when he was, in fact, the only person who did treat with the plaintiffs on its behalf."

We would also refer to *State v. United States Mutual Accident Association*, 67 Wis. 624, 31 N. W. Rep. 229; *Stanhilber v. Mutual Mill Insurance Co.*, 76 Wis. 285, 45 N. W. Rep. 221; *Stehlock v. Milwaukee Mechanics' Insurance Co.*, 87 Wis. 322, 58 N. W. Rep. 379; *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556; *Wicks Bros. v. Scottish Union & National Insurance Co.*, 107 Wis. 606, 83 N. W. Rep. 781; *Wisconsin Central R. Co. v. Phoenix Insurance Co.*, 123 Wis. 313, 101 N. W. Rep. 703; *Welch v. Fire Association of Philadelphia*, 120 Wis. 456, 98 N. W. Rep. 227; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. Rep. 801.

In *Queen Insurance Co. v. Patterson Drug Co.*, 73 Fla., —, 74 South. Rep. 807, we had occasion to quote and discuss to some extent Sections 2765 and 2777 of the General Statutes of 1906, though we were not there dealing with the precise questions which confront us in the instant case. We copied therein the Texas statute and pointed out that it was of similar effect to our statute. We also quoted with approval an excerpt from the opinion rendered in *German Insurance Co. v. Everett*, — Tex. Civ. App., — 36 S. W. Rep. 125, to which we would again refer. Also see *German Insurance*

Co. v. Everett, 18 Tex. Civ. App. 514, 14 S. W. Rep. 95. The following cases will also be found instructive upon the points which we are now considering: Fred Miller Brewing Co. v. Council Bluff Insurance Co., 95 Iowa 31, 63 N. W. Rep. 585; St. Paul 54 - Fire & Marine Insurance Co. v. Sharer, 76 Iowa, 282, 41 N. W. Rep. 19; Continental Insurance Co. v. Ruckman, 127 Ill., 364, 20 N. E. Rep. 77, 11 Am. St. Rep. 121; Pierce v. People, 108 Ill., 11, 46 Am. Rep. 683; Phoenix Insurance Co. v. Levy, (Tex. Civ. App.) 33 S. W. Rep. 992; Pollock v. German Fire Insurance Co., 127 Mich. 460, 86 N. W. Rep. 1017; New York Life Insurance Co. v. Russell, 77 Fed. Rep. 94, 23 C. C. A. 43; Bank of Brunson v. Aetna Insurance Co., 203 Fed. Rep. 810; Continental Life Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. Rep. 87; Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. Rep. 281; New York Life Insurance Co. v. Cravens, 178 U. S. 389, 20 Sup. Ct. Rep. 962. Also see note on page 124 of 107 Amer. St. Rep.

We have examined all of the authorities which have been cited to us, as well as others, devoting especial attention to those cited by the defendant. The cases bearing upon the questions which we are now considering are so numerous and the results announced by the different courts are so varied that we cannot undertake to cite or discuss them all. It must be conceded that the authorities are more or less conflicting and that it would be impossible to reconcile or harmonize them. This is due somewhat, but not entirely, to different statutes and variant facts and circumstances. All that we attempt to do is to select from the great mass such authorities as seem to us to bear most directly upon the precise points involved in the instant case and to contain what we conceive to be correct statements of the principles of law which should control. The defendant strongly relies upon Allgeyer v. State of Louisiana, 165 U. S. 578, 17 Sup. Ct. Rep. 427; Old Wayne Mutual Life Insurance Co., v. McDonough, 204 U. S. 8, 27 Sup. Ct. Rep. 236, reversing the judgment rendered by the Supreme Court of Indiana in 164 Ind. 321, 73 N. E. Rep. 703; New York Life Insurance Co. v. Head, 234 U. S. 149, 34 Sup. Ct. Rep. 879; Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. Rep. 255. The defendant states that nearly all of the cases cited and relied upon by the plaintiff, some of which we have cited above, were decided prior to Allgeyer 55 v. Louisiana, supra, which was decided in March, 1897, and, therefore, "are necessarily overruled by that decision, as far as there is any conflict, and also by Old Wayne Mutual Life Insurance Co., supra, so far as they encounter it." Some of the cases which we have cited above were decided prior to Allgeyer v. Louisiana, supra, and some subsequently thereto, but that fact would not seem to be of as much moment as the defendant contends. We would point out as instances that Wick Bros. v. Scottish Union & National Insurance Co., supra; Welch v. Fire Association of Philadelphia, supra; Wisconsin Central Ry. Co. v. Phoenix Insurance Co., supra; Presbyterian Ministers' Fund v. Thomas, supra, were all decided by the Wisconsin court subsequent to the decision ren-

dered in *Allgeyer v. Louisiana*, *supra*, and, as the prior decisions of the Wisconsin court, which we have cited above, were cited and approved in these subsequent decisions, evidently that court did not consider that such prior decisions had been overruled by *Allgeyer v. Louisiana* *supra*. We would refer especially to *Welch Bros. v. Fire Association of Philadelphia*, *supra*, in which the opinion was written by Mr. Justice Marshall, who also wrote the opinion in *John R. Davis Lumber Co. v. Hartford Fire Insurance Co.*, which we have commended above, and in which both the opinions rendered in *John R. Davis Lumber Co. v. Hartford Fire Insurance Co.*, *supra*, and *Schomer v. Hekla Fire Insurance Co.*, *supra*, are cited and approved. It is true that no Federal questions were discussed or Federal cases cited therein. The defendant also points out that, although the case of *Swing v. Munson*, 191 Pa. 582, 43 Atl. Rep. 342, 58 L. R. A. 223, cited by the plaintiff, would seem to sustain its contention, the same plaintiff, *Swing*, "sued other parties in other States with the opposite result," and cites *Swing v. Hill*, 165 Ind. 411, 75 N. E. Rep. 658, and *Swing v. B. E. Brister Co.*, 87 Miss. 516, 40 South. Rep. 146, and also cites *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. Rep. 218.

We cannot go into any extended discussion or analysis of all these cases. In the case of *Allgeyer v. Louisiana*, *supra*, the statute of Louisiana presented for construction, the nature of the action, the pleadings, facts and circumstances all differ so widely from those in the instant case that the principles announced in the opinion rendered in the cited case would seem to have but little applicability to the instant case. This is likewise true of the other decisions of the United States Supreme Court cited by the defendant. As was said in *Allgeyer v. Louisiana*, *supra*, text, page 590: "Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which state legislation cannot deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the state statutes. Such acts come within the principle of the *Hooper* case (*supra*), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform. This does not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or

other powers as to it may seem proper. In the exercise of such right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution."

It will be observed on reading the opinion that the court
57 was careful to differentiate that case from *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, from which we have already quoted above. We would also call attention to the following holding in *Allgeyer v. Louisiana*, *supra*: "Hooper v. California, 155 U. S. 648, distinguished from this case; and it is further held that, by the decision in this case it is not intended to throw any doubt upon, or in the least to shake the authority of that case.

"When or how far the police power of the State may be legitimately exercised with regard to such subjects must be left for determination in each case as it arises."

We think that *Hooper v. California*, *supra*, is far more nearly in point to the instant case than the other Federal cases cited and relied upon by the defendant. We shall not stop to comment upon *Swing v. Brewster*, 87 Miss. 516, 40 South. Rep. 146; *Swing v. Hill*, 165 Ind. 411, 75 N. E. Rep. 658; *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. Rep. 218, also cited and relied upon by the defendant, in all of which *Allgeyer v. Louisiana*, *supra*, is cited. We content ourselves with stating that we have carefully read the same and do not find they throw much light upon the points which we are now considering. We prefer to rest the conclusion which we have reached upon the principles announced in *Hooper v. California*, *supra*, and the Wisconsin and other cases which we have cited above.

As we read the pleadings in the instant case and the respective orders made thereon, which form the basis for the assignments now under consideration, we fail to find where any such orders had the effect of giving extra-territorial effect to either section 2785 or 2777 of the General Statutes of 1906, or extending their operation into the State of Pennsylvania, as the defendant contends. The pleadings show that the property upon which the two policies were issued was situated in Florida and that such policies were delivered to the plaintiff in Florida by Lowry & Prince, who were not only acting as insurance brokers for the plaintiff in the transaction, but also

58 as agents for the defendant. In other words, we are of the opinion, and so hold, that the two policies of insurance were and are Florida contracts and that by reason of the transactions had by the defendant with Lowry & Prince and what was done by and through them, the defendant paying them, "the usual broker's commission" for effecting such insurance, the defendant was doing business in Florida, and that Lowry & Prince were the defendant's agents, within the provisions of Section 2785 and 2777, as was held by the Circuit Court. This conclusion is confirmed we think by the admission in the concluding paragraph of the rejoinder wherein it is alleged that the defendant "did request information from them (meaning Lowry & Prince), as to the subject-matter insured," because it is a matter of common knowledge that fire in-

surance companies, before accepting applications for insurance, have such inspections made as are necessary to inform themselves of the character and condition of the property to be covered by the insurance applied for and when the defendant "did request information" from Lowry & Prince, "as to the subject-matter insured" it constituted them its agents for the purpose of obtaining information that would influence its attitude and action in reference to the subject about which it sought information, and it cannot now be heard to deny this relationship and thereby escape the consequent liability. As we view it, the laws of the State of Pennsylvania had nothing to do with the transaction, were not applicable or controlling and were not before the Circuit Court for consideration. We are further of the opinion that, if Lowry & Prince were such statutory agents of the defendant, they must be held to be agents or representatives of the defendant "to all intents and purposes," as Section 2765 expressly provides, that is general, and not special, agents. It is true that in *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, — Sup. Ct. Rep., — which is cited to us by the defendant, it was held: "While Sec. 2765, Florida Statutes, undertakes to designate as agents of insurance companies certain persons in fact, acting

for such companies in some particulars, it does not fix the scope of their authority as between the company and third persons, and does not raise special agents with limited authority into general ones with unlimited power." We have carefully read the opinion rendered in this case, as well as the two opinions rendered in the same case by the Circuit Court of Appeals for the Fifth Circuit, reported in 202 Fed. Rep. 113, and 211 Fed. Rep. 31, but shall not undertake to analyze or discuss them. For a proper understanding of the opinion rendered by the United States Supreme Court it is necessary to have in mind all the facts and circumstances as they were developed in that case. Suffice it to say that they are very different from those in the instant case. Here no rights of third persons are involved and we are not called upon to fix the scope of the authority, "as between the company and third persons," which would seem to have been a controlling feature in the cited case. Be that as it may the duty devolves upon us to construe our own statutes. As was said in *Osborne v. State of Florida*, 164 U. S. 650, text 654, 17 Sup. Ct. Rep. 214, "The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own State. *Leffingwell v. Warren*, 2 Black, 599; *People v. Weaver*, 100 U. S. 539, 541; *Noble v. Mitchell*, 164 U. S. 367, 372, and cases there cited."

We would call especial attention to *Noble v. Mitchell* 164 U. S. 367, 17 Sup. Ct. Rep. 110 referred to above for the reason that in that case, as is stated therein, the Supreme Court of Alabama was called upon to construe certain statutes regulating the transaction of business by insurance companies within that State which were quite similar to our statutes which we are now considering and, as was stated in the opinion in the cited case, which was rendered by Mr.

Justice White: "The highest court of the State having affirmed the validity of the state statute and enforced its provisions against the plaintiff in error, despite his objection duly made that such statute was repugnant to the Constitution of the United States, a writ of error was allowed, and the cause is here for review." The opinion then proceeds to quote the following language from *Hooper v. California*, 155 U. S. 648, text 655, from which we gave certain excerpts above: "The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the Constitution of the United States."

After quoting this language from his former opinion, Mr. Justice White goes on to say: "It inevitably results from this ruling that the State of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability, or otherwise, the doing of acts within the territory of the State calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the State." For the opinion rendered by the Alabama Supreme Court see 100 Ala. 519,

14 South. Rep. 581, 25 L. R. A. 238.

As we have already said by our two statutes which we are considering, all insurance companies doing business within the State, whether incorporated or not, domestic or foreign, are placed upon the same footing and enjoy equal privileges and immunities. This being true, the courts should not make a discrimination in favor of a foreign insurance corporation which is attempting to do business in Florida without complying with the statutory requirements. We would refer again to *Queen Insurance Co. v. Patterson Drug Co.*, 73 Fla. ___, 74 South. Rep. 807, and call attention to what we have so recently said both on the subject of agents of insurance companies under our statutes and of the waiver by such agents of provisions in insurance policies. Also see the authorities there cited, especially *Tillis v. Liverpool, L. & G. Insurance Co.*, 46 Fla. 268, 35

South. Rep. 171, 110 Am. St. Rep. 89, and Eagle Fire Co v. Lewallen, 58 Fla. 246, 47 South. Rep. 947. Still other decisions of this court, as well as of courts of other jurisdictions, will be found cited in these opinions. We would also refer to Aetna Insurance Co. v. Holmes, 59 Fla. 116, 52 South. Rep. 801; Hartford Fire Ins. Co. v. Brown, 60 Fla. 83, 53 South. Rep. 838; Southern States Fire Ins. Co. v. Vann, 69 Fla. 549, 68 South. Rep. 647, I. R. A. 1916B 1189; Palatine Insurance Co. v. Whitfield, 73 Fla. —, 74 South Rep. 869. We would also refer again to Schomer v. Hekla Fire Ins. Co., 50 Wis. 575, 7 N. W. Rep. 544, especially the extract therefrom which we copied above. Reading the replications and the rejoinder thereto, which are copied in the prefatory statement, in the light of the authorities which we have cited, we are of the opinion not only that Lowry & Prince, under our statute, were the agents of the defendant, but that the warranty clause therein as to the existence of concurrent insurance on the property, must be held to have been waived by the defendant by reason of the statements and acts of Lowry & Prince, its agents. It necessarily follows from what we have said that we are of the opinion that the first five assignments, presenting questions arising under the Constitution of the United States, have not been sustained.

62 We next take up the sixth and seventh assignments which are argued together by the counsel for the defendant, being predicated upon the sustaining of the plaintiff's demurrer to the defendant's rejoinder, as stated in the brief of the defendant's counsel, "the former being grounded on the fact that it was a good answer to the replications, the latter on the fact that the replications were bad." In treating the first five assignments we have already held in effect that we were of the opinion that the rejoinder, which was filed to all the amended replications, was not a good answer to the same, and we might well content ourselves with what we have there said. As is said by the counsel for the defendant in his brief, "It is obvious that this rejoinder was a complete answer to the replications unless as a matter of law Lowry & Prince were agents of the defendant, and even if they were defendant's agents it was still good unless their agency extended continuously for every purpose, after the delivery of the policies, even to the extent of making new contracts." We have squarely held that as a matter of law Lowry & Prince were the agents of the defendant "to all intents and purposes," as the statute expressly provides, and that the acts of such agents in connection with the cancellation of the warranty provision stamped upon the policies as to the existence of concurrent insurance upon the property and the statements made by such agents to the plaintiff were within the scope of the real or apparent authority of such agents, and, therefore, were binding upon their principal, the defendant. As we held in Eagle Fire Insurance Co. v. Lewallen, 58 Fla. 246, 47 South. Rep. 947, which principle we had announced in prior and have followed in subsequent opinions: "The acts of an agent performed within the scope of his real or apparent authority are binding upon his principal. The public have a right to rely upon an agent's apparent authority and are not bound to enquire as to his special powers, unless the circumstances are such as to put them upon inquiry." Also see Tillis v. London & Liverpool & Globe

Insurance Co., 46 Fla. 268, 35 South. Rep. 171, 110 Am. St. Rep. 89; Hartford Fire Insurance Co. v. Redding, 47 Fla. 228, 63 37 South Rep. 62, 67 L. R. A. 518, 110 Am. St. Rep. 118; Southern States Fire Insurance Co. v. Vann, 69 Fla. 549, 68 South Rep. 647, L. R. A. 1916B 1189; Beekman v. Sontag Investment Co., 67 Fla. 293, 64 South. Rep. 948. The counsel of the defendant in his brief virtually concedes that, under our holding in Eagle Fire Insurance Co. v. Lewallen, *supra*, an insurance agent, acting within the scope of his real or apparent authority, would have the power or authority to waive a provision in the policy which was a condition subsequent, but earnestly contends that the warranty clause endorsed upon the policies declared on was not a condition subsequent, but a condition precedent, which could not be waived by Lowry & Prince. For convenient reference we copy here such warranty clause, stamped upon each of the policies, as the rejoinder states, by the defendant, "at the special request of the said Lowry & Prince," which clause is as follows: "Warranted same gross rate terms and conditions as and to follow the American Central Ins. Co. of St. Louis, Mo. and that said Company has, throughout the whole time of this policy at least \$5,000 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

We do not construe this clause as a condition precedent. Under our holding in *Tillis v. Liverpool & London & Globe Co.*, *supra*, it would seem to be in the nature of a condition subsequent. Also see 2 Cooley's Briefs on the Law of Insurance, 1480, and authorities there cited. Strictly speaking, such warranty clause may be neither a condition precedent or condition subsequent. See 2 Cooley's Briefs on the Law of Insurance, 1121, and authorities there cited, especially *Redman v. Aetna Insurance Co.*, 49 Wis. 431, 4 N. W. Rep. 591. We shall not pause to discuss this point, as it is a matter of no especial moment, so far as the proper disposition of the instant case is concerned. See 19 Cyc. 777, where the law would seem to be correctly stated as follows: "When an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is not that the instrument is upon 64 a breach thenceforth a nullity and has no legal existence, but only that upon the violation of the covenants by the insured the insurer shall cease to be bound by his covenants. Inasmuch therefore as such conditions are inserted for the benefit of the insurer they may all be waived by him, except when the insured by the act loses his insurable interest. Even a stipulation that the conditions of a policy cannot be waived, or if waived at all only in a certain manner, may itself be waived." Also see the authorities from the different jurisdictions cited in the notes to support the text. The following later authorities will also be found instructive: *Black v. Grain Shippers Mutual Fire Insurance Association*, 171 Iowa 309, 152 N. W. Rep. 7; *Liquid Carbonic Acid Manufacturing Co. v. Phoenix Insurance Co.*, 126 Iowa 225, 101 N. W. Rep. 749; *Plunkett v. Piedmont Mutual Insurance Co.*, 80 S. C. 407, 61 S. E. Rep. 893; *Gold Issue Mining & Milling Co. v. Pennsylvania Fire Insurance Co.*, 267 Mo. 524, 184 S. W. Rep. 999. As to the further contention of the defendant that the replications set out a different contract from

those alleged in the declaration we cannot agree. We do not consider the replication as making what is known as a departure in pleading, therefore there is no occasion for us to discuss that doctrine. As to what constitutes a departure in pleading see *Tillis v. London & Liverpool & Globe Insurance Co.*, *supra*, and *Eagle Fire Insurance Co. v. Lewallen*, *supra*.

The defendant further contends in support of these assignments that the replications were bad, therefore the demurrer to the rejoinder reaches back to them and should have been overruled. Undoubtedly it is true, as we have frequently held, that "In an action at law wherein a demurrer is interposed to replications to a plea, all previous pleadings are thereby opened up, and judgment should be rendered thereon against the party who committed the first serious error, and if the plea should be held to be bad, judgment on the demurrer is properly rendered against the defendant." *Atlantic Coast Line R. Co. v. Beazley*, 54 Fla. 311, 45 South. Rep. 761. Also see 18 Ency. of Pl. & Pr. 86. We have held that, under Section 1451 of the General Statutes of 1906, a plaintiff "may file as many replications or subsequent pleadings to any pleading of the defendant as he may desire," though we have said that the advisability of filing a number of replications was questionable. See *Southern Home Insurance Co. v. Putnal*, 57 Fla. 199, 49 South. Rep. 922, and *Hartford Fire Insurance Co. v. Redding*, *supra*. It will be observed that the defendant did not interpose a demurrer to the amended replications either jointly, severally, or jointly and severally, or file a motion to strike out or for compulsory reformation, as it might have done, if it conceived that such replications, or any of them, were insufficient or faulty in any respect. Instead of so doing, the defendant filed a rejoinder to all of such replications. If the demurrer interposed to the rejoinder be carried back to the replications, it must be considered as addressed to all of the replications as an entirety. It would necessarily follow that if any one of the replications is a good answer to the first plea, the judgment was properly rendered for the plaintiff on the demurrer to the rejoinder. See the discussion and the authorities cited in *Southern Home Insurance Co. v. Putnal*, *supra*. It is unquestionably true, as we have already said, that the quality of certainty is especially requisite in replications and rejoinders. It is further true that, if there are several pleas, and the replication undertakes to answer one of such pleas, it must answer the whole of the plea which it professes to answer. 18 Ency. of Pl. & Pr. 655. But, as is said on page 656 of the work just cited, "The pleader may, however, reply to any one of several material allegations of the plea where each of such allegations is essential to its support, because the demolition of any one of them will effectually destroy the whole defense." Also see 31 Cyc. 250; Andrews' Stephens Pleading, section 138; *Lawson v. State*, 9 Ark. (4 Eng.) 9; *Smith v. Olliphant*, 2 Sandf. (N. Y.) 306. Also see our holding in *New York Life Insurance Co. v. Mills*, 51 Fla. 256, 41 South. Rep. 603. We call attention to the fact that, while the different amended replications, if they be properly designated replications, instead of forming but a single replication, divided into numbered paragraphs for convenience, as would seem to be the case, are addressed to the first plea, in reality they go to separate portions of such plea. It is

also obvious that such plea has several material and distinct averments. Whether considered as several replications directed to different or distinct material averments in the plea, or as one replication, separated into paragraphs, as said above, addressed to the plea as an entirety, we do not consider such replications or replication demurrable. In other words, we think that the replication, as we prefer to call it, constitutes a good answer to the first plea. Entertaining these views, we must hold that the sixth and seventh assignments have not been sustained.

We now reach the eighth and tenth assignments, which are argued together, the defendant's counsel stating in his brief: "The former alleges error in holding that plaintiff could secure reformation of the policies in an action at law, and the latter in permitting the plaintiff to recover judgment on different causes of action from those set forth in its declaration."

In discussing the preceding assignments, we have already held adversely to this contention of the defendant, so there is no occasion to say more here. We do not understand the order of the Circuit Court as holding that the plaintiff could secure reformation of the policies in an action at law. We have also said that we did not consider that the replications constituted a departure in pleading.

The ninth assignment is that "The Court erred in holding that Lowry & Prince had authority to abrogate the contracts represented by the policies sued on, and make new and different contracts with the plaintiff."

We have already discussed this assignment and expressed our view of the holding in *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, — Sup. Ct. Rep. —, the only authority cited in support of such assignment. It must be held to have failed.

The only remaining assignment is the eleventh, which is as follows: "The Court erred in sustaining the demurrer of the plaintiff to the defendant's second plea." The second plea is copied in full in the prefatory statement. It was filed to the declaration as constituting a full and complete defense to the action upon the two policies. The declaration, as well as the attached policies, shows that the insurance was upon both real and personal property. The defendant rightly says that the policies may be divisible and cites *Hartford Fire Insurance Co. v. Hollis*, 64 Fla. 89, 59 South. Rep. 785. The only other authorities cited by the defendant in support of this assignment are *Georgia Home Insurance Co. v. Hopkins*, 71 Fla. 282, 71 South. Rep. 285, and Section 1437 of the General Statutes of 1906, Compiled Laws of 1914, which is as follows: "All pleadings capable of being taken distributively shall be taken." We do not see wherein these authorities avail the defendant in support of this assignment, therefore we must hold that it has not been sustained.

The judgment will be affirmed.

Browne, C. J., and Whitfield and West, JJ., concur.
Taylor and Ellis, JJ., dissent.

68 ELLIS, J., dissenting:

I am unable to agree with the conclusion arrived at by the court in this case.

The defendant's first plea contained substantially the same averments of ultimate facts as its rejoinder, viz: The policies of insurance sued on were Pennsylvania contracts; that Lowry & Prince were not the defendant's agents, but were agents for the plaintiff only. The plea then avers that each policy contained a certain warranty which the plaintiff had violated. The replication of the plaintiff which considered in its entirety was a mere traverse of the averments of the plea as to the contract being a Pennsylvania contract and that Lowry and Prince were agents only of the plaintiff alleged the contracts to be Florida contracts and a waiver of the warranty by defendant through Lowry and Prince who were alleged to be the defendant's agents. Now the rejoinder merely took issue upon the allegations of the replication as to the contracts being Florida contracts and that Lowry and Prince were defendant's agents and that the warranty had been waived, by averring that the contracts were made in Pennsylvania, that Lowry and Prince were not their agents and that the defendant had not waived the warranty.

If this rejoinder was true it constituted a perfect defense, because neither Section 2765 nor 2777 of the General Statutes of Florida, 1906, Florida Compiled Laws, 1914, can have any force or effect beyond the limits of the State of Florida by imposing upon the defendant and Lowry and Prince the relation of principal and agent *in invitum*. That a State cannot extend the operation of its statutes beyond its borders into the jurisdiction of another State is conceded to be true in the majority opinion, which contains excerpts from the

opinion of Mr. Chief Justice White of the Supreme Court of
69 the United States in the case of *New York Life Insurance Co. v. Head*, 234 U. S. 149, Sup. Ct. Rep., upon that point. Therefore if Sections 2765 and 2777 of the General Statutes are to be applied in this case the defendant insurance company must be either a corporation of this State or actually doing business in this State through its officers or agents, or that the contracts sued on were made or executed in this State. This is true because the object upon which the statute acts, whether it be persons or things, must be within the State's jurisdiction. As Mr. Chief Justice White said in the case referred to, there is a difference which in the nature of things must obtain "between questions concerning the operation and effect of a State law within its borders and upon the conduct of persons confessedly within its jurisdiction; and its right to extend its authority beyond its borders so as to control contracts made between citizens of other States and virtually in fact to disregard the law of such other States by which the acts done were admittedly valid." That is the distinction which was drawn in the case of *Hooper v. State of California*, 155 U. S. 648, 15 Sup. Ct. Rep. 207, by the then Mr. Justice White. A statute of California punished "every person who in this State procures or agrees to procure for a resident of this State any insurance" from a corporation not of that

State unless it had filed the bond required by the statute relative to insurance. Hooper was the agent of certain insurance brokers in New York City. Mott a resident of California, inquired of Hooper if he could procure a certain amount of insurance on a vessel named the "Alliance" at a given rate of premium, no particular company being specified by Mott. Hooper communicated with his principals in New York, who placed the insurance in a Boston Company and advised Hooper. The policy was forwarded by the New York brokers to Hooper, who delivered it to Mott, the latter paying the former the premium as the agent of the New York brokers. Hooper was arrested and charged with the misdemeanor denounced by the statute. It was contended by him that the statute was illegal because

it undertook to forbid the procurement of a contract outside
70 of the State, and the evidence showed that the contract in fact was entered into without the territory of California.

Judge White said that the admission that the insurance was procured for the resident from a foreign company which had no agent in the State did not exclude the possibility of its having been procured within the State. "If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute." Hooper was an insurance broker; he was the representative of other insurance brokers who were in New York, and to the extent of procuring the insurance was the representative of the insurance company, so that it might be said that he procured the insurance in California, for a resident of that State. The statute however dealt with and operated upon the conduct of Hooper, a resident of and whose act was confessedly committed in the State of California. This view however was not concurred in by Justices Harlan, Brewer and Jackson, who thought that the application of the statute to the case was an illegal interference with the liberty both of Mott and Hooper as well as an abridgement of the privilege of the firm of New York brokers through whom the policy was obtained, and the fallacy of the argument lay in the assumption that Hooper was the agent of the insurance company. In the case of *New York Life Insurance Co. v. Head*, supra, the court simply held that a policy of insurance issued in Missouri and its provisions controlled and governed by the statutes of that State might be affected by a loan agreement made in New York in such a way as to change the liability of the insurer under the laws of Missouri. The loan was applied for by the beneficiary from New Mexico to the company in New York, and the court held that the loan agreement was a New York contract.

Now the defendant company was not a corporation of Florida, nor was it doing business in this State by and through any of its officers or agents so the pleadings admit. The only question therefore, so far as this point is concerned is, were the contracts sued upon

71 Florida contracts, or were they made and executed in Pennsylvania? The rejoinder avers that the contracts sued on "were written and executed by the defendant in the State of Pennsylvania and thereupon delivered and sent by mail to the said Lowry and Prince at Tampa, Florida, as brokers of the plaintiff."

"That Lowry and Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contract sued on or to represent it in any manner, shape or form," etc. These averments of fact being well pleaded were admitted by the demurrer. If, however, the rejoinder contains any averments which are inconsistent with or contradictory of those quoted it should be held to be bad on the demurrer; or if the language used has on its face two intendments, it will be tested by the weaker.

The attack made by the demurrer upon the rejoinder, however, can in the nature of the case receive no assistance whatever from the sections of the General Statutes referred to, until it appears from the pleadings that the contracts of insurance are Florida contracts, because until that is established they cannot be affected or controlled by the laws of Florida. The defendant is not a Florida corporation. It was not at the time the policies were issued nor had been represented in this State by any officer or representative, nor do the policies themselves contain any clause as to the intention of the parties concerning any place according to the laws of which they desired the contracts to be governed. Nor do they provide that the payment of the premium shall be a condition precedent to their taking effect. All this is shown by the pleadings and exhibits A and B, which are made part of the declaration. When the contracts were entered into therefore if Lowry and Prince were not the defendant's representative or agents then neither the proposition, acceptance nor delivery if necessary was made in this State. There was nothing so far as the defendant was concerned to which the statute could apply. If the contracts were made in this State, then certainly they will be affected and controlled by the statutes

72 of this State; but if they were not made here, but were made in some other jurisdiction, then as certainly the laws of this State do not control their provisions. Now the rejoinder expressly avers that the contracts were made in Pennsylvania, and denies that Lowry and Prince were defendant's representative. The court holds that inasmuch as the rejoinder admits that the defendant had written insurance on the plaintiff's property since 1908 continuously, and that Lowry and Prince transmitted to the defendant at Philadelphia the applications for such insurance and received by mail the policies for the plaintiff, and transmitted for the plaintiff the amount of the premiums less the usual brokers' commission, it is subject to the demurrer because such admissions show that the policies sued on were Florida contracts. This conclusion does not follow because a policy of fire insurance is a personal contract which like all such contracts is completed by the signature of the parties and the transfer of the consideration. It is a parol contract, not a sealed instrument, and may be proved as other parol contracts. See authorities cited in note to Stephenson v. Allison, reported in 138 Am. St. Rep. 26. It is a simple contract of indemnity against loss by fire. See Paul v. Virginia, 8 Wall. (U. S.) 168. The making of such a contract is a mere incident of commercial intercourse.

See New York Life Ins. Co. v. Cravens 178 U. S. 389, 20 Sup. Ct. Rep. 962. And the situs of the contract or place of consummation is determined by the place of acceptance, and not by the place of proposal. See Peters v. E. O. Painter Fertilizer Co., decided at the present term of this court. In that case Mr. Chief Justice Brown, speaking for the court, said: "A contract of sale may be made by the acceptance of an offer to sell as well as by the acceptance of an offer to purchase, and where the last act necessary to complete the contract is performed, that is the place of the contract." The case follows the doctrine laid down by this court in Morgan v. Eaton, 59 Fla. 562, 52 South. Rep. 305, to which it refers. In the latter case the court, speaking through Mr. Justice Taylor, said:

73 "It seems to be well settled law that where a person residing in one place makes a proposal to purchase property by letter to a person residing in another place and such proposal is there accepted, the place of acceptance, and not the place of the proposal, is the place of the contract. 22 Am. & Eng. Ency. Law, (2nd ed.) p. 1324, and numerous cases there cited." On this point therefore it is unnecessary to examine other authorities because the doctrine announced in the two cases cited is the settled law of this State, and by that doctrine this case must be tested as to the situs of the contracts sued upon for this court to be consistent.

Even when there is a local agent of the insurance company in the State where the property insured is located, but his authority is limited to receiving and forwarding applications to the insurer's home office for acceptance or rejection, there the contract will be deemed to have been made at such home office when a policy in substantial conformity to the application is mailed directly from such office to the insured or his agent in another State and no conditions precedent to its taking effect are expressly imposed and there is nothing in the transaction showing that the contract was intended to be left open until the receipt of the policy by the insured. See 2 Wharton on Conflict of Laws, 1011; State Mutual Fire Ins. Ass'n v. Brinkley Stave & Heading Co., 61 Ark. 1, 31 S. W. Rep. 157, 29 L. R. A. 712; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476; Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556; Hartford Steam-Boiler Ins. & Ins. Co. v. Lasher Stocking Co., 66 Vt. 439, 29 Atl. Rep. 629. The same rule applies where the policy is mailed to a third person who for the purposes of the transaction was, or was deemed to be the agent of the insured. See French v. People, 6 Colo. App. 311, 40 Pac. Rep. 463; Commonwealth Mut. Fire Ins. Co. v. William Knabe & Co. Mfg. Co., 171 Mass. 265, 50 N. E. Rep. 516; 3 Am. & Eng. Ency. Law, 551; May on Insurance, Sec. 86; Baker v. Spaulding, 71 Vt. 189, 42 Atl. Rep. 982; Galloway v. Standard Fire Ins. Co., 45 West Va. 237, 31 S. E. Rep. 939.

74 The deposit of the policy in the mail at the home office of the insurer is a delivery and charges the insured with constructive notice of the acceptance of the proposition. Galloway v. Standard Fire Ins. Co., supra. The policies which are made part of the declaration contain clauses that they "shall not be valid until countersigned by the duly authorized agent of the company at Philadelphia, Pa." They were countersigned there as shown upon their face.

Now it cannot be said from the pleadings in this case that either notice to the plaintiff of the acceptance of its application by the defendants for the insurance, or the delivery of the policies to the insured or the payment of the premium by the insured were conditions precedent to the taking effect of the policies; nor can it be said that the insertion of the warranty was a condition imposed by the defendant materially changing the terms of the original proposition. As to the latter proposition it will be observed that the policies sued on are attached to the declaration and made a part of it by apt words. They contain the warranty on their faces. The plaintiff alleged in its replication that "Lowry and Prince caused the defendant to write the said first policy of 1908 and said Lowry and Prince caused and procured the defendant to renew said policy from time to time and to finally write and issue policies here sued on" etc. From this allegation it appears that the application for the policies sued on contemplated the insertion of the warranty mentioned which from the pleadings appears to have been contained in the policies issued prior to those sued on which seem to have been issued in the usual form containing the same warranties and conditions. I do not regard either the notice of acceptance by the defendant of the application for insurance nor the delivery of the policy to the plaintiff as conditions precedent to their taking effect because this court has held that the contract is consummated where the acceptance of the proposition takes place, not where notice of acceptance is received or delivery

made, besides delivery of a policy of insurance is not essential
75 to its validity. It is a simple, not a sealed contract and may be sued on although there has been no delivery of it to the insured. If the payment of the premium is regarded by some authorities as an implied condition precedent to the consummation of the contract it has not been so held in this State, which holds to the doctrine as stated that the place of acceptance of the proposition determines the place of the making of the contract; but whether that is true or not the determination of the point is unnecessary as the rejoinder avers that Lowry and Prince were not authorized to receive money on defendant's account, and that the plaintiff transmitted to the defendant by mail the amount of the premium through Lowry and Prince, which fact was admitted by the demurrer. Therefore it appears from the pleadings that the premium was paid not in this State, but in Pennsylvania.

There is no distinction between the contracts considered in the two Florida cases cited and the contracts sued on in this case that requires the application of different rules of law to determine their situs because a contract of insurance like the contracts involved in the two Florida cases cited is a personal contract and is a mere incident of commercial intercourse and is consummated or executed at the place of acceptance, and delivery is not necessary to its completion. See Stephenson v. Allison, 165 Ala. 238, 51 South. Rep. 622, 138 Am. St. Rep. 26. Now the proposition to insure was made by the plaintiff through Lowry and Prince, its agents, by letter to the defendant at Philadelphia; so much the pleadings admit. The proposition was accepted by the defendant at Philadelphia, and there the contracts were written and signed and there delivered to the United States postal service to be transmitted to Lowry and Prince

for the plaintiff; this the pleadings also show. When then did Lowry and Prince become the representatives of the defendant in the making of the contract? Not when they received the premiums from the plaintiff, because that was the plaintiff's act; besides, the contracts had then been executed. Nor when they transmitted the

76 premiums to defendant by mail, because that was also the plaintiff's act. If the sections of the General Statutes referred to were intended to operate only upon the act of Lowry and Prince and affect them only, the case of *Hooper v. State of California*, supra, would be in point, and no doubt the case would be authority for holding them to answer to the statute's provisions; but in my opinion the statute cannot be made to operate through them upon a person or corporation beyond the limits of the State and affect the provisions of a contract made elsewhere.

The act of Lowry and Prince in retaining from the amount of the premiums which they were instructed by the plaintiff to forward to the defendant the "usual brokers' commission" did not have the effect of changing the situs of the contracts and constitute them the defendant's agents for "all intents and purposes" so that they could alter the terms of the contracts which had been made in Pennsylvania. That is to say, constitute them the agents of the defendant to make a new contract of insurance or waive any warranty in the old ones. The case of *Davis Lumber Co. v. Hartford Fire Ins. Co.*, 95 Wis. 226, 70 N. W. Rep. 84, 37 L. R. A. 131, referred to in the majority opinion is not in my judgment in point, because in that case the policies of insurance under consideration were Wisconsin contracts, and the court merely held that under a statute similar to the Florida statute one who procures insurance for another may be the agent for some purposes of both the insurer and insured. In the case of *Schomer v. Hekla F. Ins. Co.*, 50 Wis. 575, 7 N. W. Rep. 544, the defendant company was doing business in Wisconsin directly through local agents to whom Lawson who was employed by plaintiff to obtain insurance applied for the policies, and it appears that they were executed in Wisconsin. In the case of *Rose v. Kimberly & Clark Co.*, 89 Wis. 545, 62 N. W. Rep. 526, 27 L. R. A. 556, which was a suit on a policy of insurance by the receiver of the company for an assessment, it appeared that the policy was written in Illinois by a company not authorized to do business in Wisconsin. The court applied the *Lex Fori* and held that the contract could not be enforced in Wisconsin, but not doubting that it was a valid contract

77 of Illinois. See also 5 R. C. L. p. 941. In the case of *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. Rep. 801, also cited in the majority opinion the court had under consideration a statute of Wisconsin which prohibited any corporation from doing any business of insurance of any kind in Wisconsin or with any resident of that State except according to the conditions and restrictions of the statute. A resident of Wisconsin applied by letter to the Insurance Company at Philadelphia for life insurance. The application was accepted, the policy sent to the applicant who gave his notes for the premium payable at Philadelphia. The company had not complied with the conditions and restrictions of the Wisconsin statute. The note was not paid and the company brought suit in Wisconsin to recover on the note. The court held

that the contract was made in Philadelphia, but as it was made with a resident of Wisconsin contrary to the laws of that State, it would not be enforced in that State. In Wisconsin Cent. R. Co. v. Phoenix Ins. Co., 123 Wis. 313, 101 N. W. Rep. 703, the question is not discussed, but it appears that the Insurance Company was represented in Wisconsin by agents and the policies issued in that State. In Wicks Bros. v. Scottish Union & National Ins. Co., 107 Wis. 606, 83 N. W. Rep. 781, the question was upon the right to cancel. The court held that the right to cancel exists only by contract. The policies were issued in Wisconsin. The other Wisconsin cases referred to are deemed to be not in point as the contracts sued upon were made in the State of Wisconsin by the defendant's acknowledged agents. It is undoubtedly true that considerations of public policy demand that an insurance company entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business transacted there, as was said by Mr. Justice Harlan in Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough, 204 U. S. 8, 27 Sup. Ct. Rep. 236, yet such assent cannot be assumed as to business transacted in another State although with citizens of the former State. The defendant in this case, according to the pleadings, transacted no business in Florida through its officers or agents, and therefore did not subject itself to any provision of the statutes of this State. It had a right to enter into the contract of insurance in Pennsylvania with a citizen of Florida for the purpose of insuring the latter's property in this State which it did. Any act of the legislature which would impose upon the defendant in such case, without its consent, conditions and liabilities which it did not assume by the contract would be invalid. See Allgeyer v. State of Louisiana, 105 U. S. 578, 17 Sup. Ct. Rep. 427. The act therefore should not be given that construction.

The case of Miller Brewing Co. v. Council Bluffs Ins. Co., 95 Iowa 31, 63 N. W. Rep. 565, decided in 1895 upon a contract made in 1887 where the Supreme Court of that State held in effect that the mere writing of insurance upon property located in one State by a foreign insurance company of another State at its home office was the transaction of business in the former State I think is contrary to the view entertained by the Supreme Court of the United States in Allgeyer v. State of Louisiana, *supra*. I think the order of the court sustaining the demurrer to the rejoinder was erroneous, and the judgment should be reversed.

Taylor, J., concurs.

Whereupon, to wit, on the 20th day of October, A. D. 1917, a judgment was duly rendered and entered in said cause by said Supreme Court of Florida, which order is in the words and figures following, to-wit:

"AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Defendant in Error.

"A Writ of Error to a Judgment of the Circuit Court within and for
the County of De Soto.

"This cause having been submitted to the Court at a former term thereof upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the Court being now advised of its judgment to be given in the premises, it seems to the Court that there is no error in the said judgment; it is, therefore, considered, ordered and adjudged by the Court that the said judgment of the Circuit Court be, and the same is hereby, affirmed; it is further ordered by the Court that the defendant in error do have and recover of and from the plaintiff in error, its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the Court below.

"The opinion of the Court, concurred in by Mr. Chief Justice Browne, Mr. Justice Whitfield and Mr. Justice West in this cause was this day read and ordered to be filed.

"A dissenting opinion in said cause was read by Mr. Justice Ellis in which Mr. Justice Taylor concurred."

80 And thereafter, to-wit, on the 27th day of October, A. D. 1917, came the plaintiff in error and filed in said Supreme Court of Florida a petition for rehearing in said cause, which petition for rehearing is in the words and figures following, to-wit:

81 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation,
Defendant in Error.

To the Honorable Justices of the Supreme Court of Florida:

Your petitioner, American Fire Insurance Company, would respectfully show unto the Court that this case is one of great importance, both by reason of the questions involved and the fact that the decision of this Court is subject to review by the Supreme Court of the United States, and your petitioner believes that the majority opinion overlooks material considerations, due possibly to the fact that your petitioner failed to properly present the same to the Court,

under the impression that the record conclusively showed a state of facts which precluded the conclusion arrived at in the majority opinion as to the situs of the contracts, and your petitioner respectfully submits to the Court that the majority opinion is unsound for the reasons hereinafter stated:—

1st. The majority opinion misconceives the scope and purpose of Section 2765 of the General Statutes. The opinion properly points out that a broker effecting insurance may in some cases act in a dual capacity, and in some cases there may be doubt as to whether the broker is agent of the insurer or insured. The effect of the

82 Statute is to settle such questions by making persons falling within the category of the Statute to all intents and purposes representatives of the insurer in respect of what they do at the time in the particular transaction. In other words, if they receive or receipt for money they do so as agents of the insurer, and the same is true of any other step they take, in making or causing to be made a contract of insurance. In regard to such steps taken, they are to all intents and purposes representatives of the insurer, but, as pointed out by the Supreme Court of the United States, the statute does not undertake to make any person falling within its categories an agent of the insured to all intents and purposes, outside of the particular transaction effected by or through him, because to do so would involve the conversion of a special agent with limited authority into a general agent with unlimited power. In short, the statutory agency is limited to the particular acts done, and does not extend beyond or after their performance, so that the statute is to be read as if it contained the words "in so doing shall be deemed to all intents and purposes" etc. This is consonant not only with reason, but with all the former decisions of this Court; and the construction placed upon the Statute by the majority opinion is not only opposed to the construction placed upon it by the Supreme Court of the United States, but is unreasonable in itself and convicts this Court of misunderstanding the Statute in a number of cases of which Insurance Co. vs. Lowallen, 56 Fla., 246, is a conspicuous example.

If a power of attorney were granted an agent to do certain acts, and it were therein declared that he should be to all intents and purposes an agent of the principal, that would not enlarge his powers beyond those enumerated, any more than does the familiar conclusion of an ordinary power of attorney, ratifying and confirming all acts he may do thereunder.

83 It would be a startling doctrine that a mere insurance solicitor should possess all the powers of the general manager or directors of an insurance company, and it would be equally startling that every one engaged in effecting a contract of insurance, directly or indirectly, however humble his part, should possess equal powers, and powers equal to those of the company's highest officers. Suppose an insurance solicitor executed a note for \$10,000 in name of his company, would this Court enforce the note against it on the theory that the solicitor was "to all intents and purposes" its agent? Your petitioner respectfully submits that the Legislature never intended such an absurdity, and that it is demonstrated to a certainty that the construction placed upon the Statute by the majority opinion is inadmissible. Moreover the construction given by the majority

to Section 2765 leaves Section 2777 without any field for operation, while it has a proper field for operation upon the true construction of the former section.

Your petitioner respectfully submits that this ground of its petition for rehearing presents a question of great importance in insurance litigation in this state, and that this Court is bound to be embarrassed hereafter if it adheres to the rule of construction asserted in the majority opinion, which, so far as it is aware, has never been intimated or suggested in any former decision of this Court, such former decisions having applied the statute only in the manner and to the extent contended for by your petitioner.

2nd. The majority opinion states:—"The question which we are called upon to answer is, did the Circuit Court attempt to extend the operation of these two statutes into the State of Pennsylvania? The answer to be given to this question depends upon whether the contracts of insurance must be held to be Florida or Pennsylvania contracts". It concludes that they were Florida contracts, and in so doing overlooks the following facts shown by the records—

84 (a) They were declared upon in the declaration as Pennsylvania contracts, effected in the State of Pennsylvania on April 8th, 1912, the date they were signed there by the officer of the Insurance Company.

(b) The policies upon their faces showed that they became operative in the State of Pennsylvania, when signed by the Company's agent at Philadelphia.

(c) It was lawful to make such contracts in Pennsylvania, but unlawful to make them in Florida, and the Court, in order to declare them Florida contracts had to presume an intention on the part of both the Insurance Company and Lowry and Prince to violate the laws of Florida.

(d) Not only did the plaintiff declare upon the contracts as Pennsylvania contracts, which the declaration relied upon and accepted in their entirety, but they contained provisions which were valid under the laws of Pennsylvania and invalid under the laws of Florida, viz., that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this Company"; and the further provision that "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or other representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto." The majority opinion makes the contracts different from those declared upon, as well as effective at a different time and place.

(e) The majority opinion overlooks the rule that *prima facie* the *lex loci contractus* must prevail, and goes even to the extent of presuming an intention to violate another law, and one not the proper law of contract.

(f) The majority opinion overlooks the fact that the demurrer to the rejoinder, as well as the plaintiff's own declaration, admitted that the policies were Pennsylvania contracts, executed in Pennsylvania.

Your petitioner respectfully submits that it was impossible for the Court to find as a fact, contrary to the admissions of the record, and in violation of all rules as to presumptions, that the policies were Florida contracts. The record is conclusive on the Court, that they were not Florida contracts. Your petitioner respectfully submits that the majority opinion merely begs the question by assuming that the policies are Florida contracts in order to so hold.

3rd. The majority opinion, in intimating that a request of Lowry & Prince, for information as to the subject-matter insured and the companies carrying insurance thereon, made them the insurer's agents obviously erred, because an insurer has always a right to demand information of that character from an insured or its agents. Not only that, it could cancel the policies for material error in information given in response to its request. Moreover, the rejoinder expressly averred, and the demurrer admitted, that Lowry & Prince were not authorized to represent the Company in any manner, shape or form, and this Court could not assume they did represent it in communicating information regarding the subject-matter insured. It was because the Insurance Company was not doing business in Florida and had no agents in Florida, to make inspections, etc., that it required the existence of concurrent insurance with a reliable company doing business in Florida, which presumably would look after the risk, so that the reference in the majority opinion to its being a matter of common knowledge that insurance companies make such inspections is out of place.

86 4th. The majority opinion predicates the agency of Lowry and Prince under the statute upon the erroneous conclusion that the policies were Florida contracts, and it can predicate it upon nothing else, because the demurrer admits that in point of fact Lowry and Prince were not agents of the Insurance Company, or authorized to represent it in any manner, shape or form.

5th. In reality the underlying thought of the majority opinion is, not that the contracts were Florida contracts, but that your petitioner by writing at its home office in Pennsylvania policies on property in Florida, and renewing the same, should be held to be doing business in Florida, and in that respect the decision is directly contrary to Allgeyer vs. Louisiana, 165 U. S. 578, Insece. Co. vs. Head, 234 U. S., 149, Assce. Co. vs. McDonough, 204 U. S., 8, and Provident, &c., Society vs. Kentucky, 239 U. S., 103, on a question on which this Court is bound by the decisions of the Supreme Court of the United States.

6th. The majority opinion is directed contrary to the decision in Erickson vs. Insece. Co., 62 Fla., 161, in this Court, under which the only remedy of the plaintiff was in a Court of equity, by suit for reformation of the policies, conceding the truth of the facts alleged by it, and the applicability of the Florida Statute as making Lowry and Prince agents of defendant, and that it made them general agents of the defendant.

7th. In dealing with the subject of departure the majority opinion overlooks the fact that the position of the plaintiff in its replication was to insist upon different contracts, governed by a different system of law from that applicable to the case set forth in their declaration, and to deny the validity in part of the contracts set forth in their declaration in which they were declared upon

and treated as valid, than which it would be difficult to conceive of a clearer case of variance from the cause of action declared upon.

Wherefore, your petitioner respectfully prays that a rehearing may be granted, and upon such hearing the judgment from which the writ of error is prosecuted be reversed.

And your petitioner will ever pray, etc.

JAMES F. GLEN,
Counsel for Petitioner.

88 And thereafter, to-wit, on the 5th day of November, A. D. 1917, did render and file its opinion denying the said petition for rehearing, which said opinion is in the words and figures following, to-wit:

89 In the Supreme Court of Florida, June Term, A. D. 1917, De Soto County.

AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER AND MANUFACTURING COMPANY, a Corporation, Defendant in Error.

On Rehearing.

Per CURIAM:

The declaration is in the statutory form and alleges that the "defendant issued to the plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promises" &c. The policies were not "declared upon in the declaration as Pennsylvania contracts, effected in the State of Pennsylvania on April 8th, 1912, the date they were signed there by the officers of the insurance company."

Section 2765, General Statutes, 1906, defines who "shall be deemed to all intents and purposes an agent or representative of" any insurance company as follows: "Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

Any person or firm in this State doing the acts defined in this section for any insurance company, by the terms of the law "shall be

deemed to all intents and purposes an agent or representative of such company." This does not limit the agency "to the particular acts" done by the agent or representative for the insurance company.

The demurrer to the rejoinder does not admit asserted conclusions of law that Lowry & Prince were not agents of the insurance company and as to the situs of the contract. In the rejoinder facts are alleged that the court holds to be sufficient to make Lowry & Prince the agents of the insurance company under the statute and that such agency makes the policy subject to the jurisdiction of this State.

Rehearing denied.

Browne, C. J., and Whitfield and West, JJ., concur.

Taylor and Ellis, JJ., dissent.

91 Whereupon on the 5th day of November, A. D. 1917, the said Supreme Court of Florida did make and enter its order denying said petition for rehearing, which said order is in the words and figures following, to-wit:

92 AMERICAN FIRE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

v.

KING LUMBER & MANUFACTURING COMPANY, a Corporation,
Defendant in Error.

A petition for rehearing having been filed in said cause, and same having been duly considered by the Court; it is ordered and adjudged by the Court that the said petition be, and the same is hereby denied.

93 STATE OF FLORIDA,
County of Leon:

I, G. T. Whitfield, Clerk of the Supreme Court of the State of Florida, do hereby certify that the foregoing pages numbered from one to ninety-two, inclusive contain true and correct copies of the records filed and the proceedings had in the Supreme Court of the State of Florida in the case of American Fire Insurance Company, a corporation, plaintiff in error, v. the King Lumber & Manufacturing Company, a corporation, defendant in error, and of the opinions and decision of the said Supreme Court filed in said case on the 20th day of October, A. D. 1917 and of the judgment of said Court entered therein on said 20th day of October, A. D. 1917 and of the opinion and order of said Court denying the petition for rehearing therein filed and entered on the 5th day of November, A. D. 1917 as the same appear from the originals now on file and of record in my office as Clerk of the Supreme Court of the State of Florida.

Witness my hand and Official Seal at Tallahassee, the Capital of the State, this the 17th day of November, A. D. 1917.

[Seal Supreme Court of the State of Florida.]

G. T. WHITFIELD,
Clerk Supreme Court, State of Florida.

94 And thereafter to-wit, on the 13th day of November, A. D. 1917, came the plaintiff in error, American Fire Insurance Company, a corporation, and filed in the said Supreme Court of Florida a petition for a writ of error to the Supreme Court of the United States, which petition for writ of error is in the words and figures following, to-wit:

95 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,
vs.

KING LUMBER AND MANUFACTURING COMPANY, Defendant in Error.

Now comes American Fire Insurance Company, a corporation plaintiff in error, conceiving itself aggrieved by the final judgment of the Supreme Court of the State of Florida, made and entered on the 20th day of October, A. D. 1917, in the above stated cause, whereby it was considered and adjudged by the said Supreme Court that the final judgment of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for the County of De Soto, should be and was affirmed, and hereby petitions the Honorable Jefferson B. Browne, Chief Justice of the said Supreme Court, for an order allowing a writ of error in the said cause, to the end that the said judgment of the Supreme Court of Florida may be reviewed by the Supreme Court of the United States of America as provided by the laws of the United States, returnable to the said Supreme Court of the United States, according to the laws of the United States in that behalf made and provided, and also that an order may be made herein fixing the amount of security which the said plaintiff in error shall give and furnish upon the said writ of error, to the end that the same may operate as a supersedeas, and that thereupon all further proceedings in this Court be suspended and stayed until the determination of the

96 said writ of error by the Supreme Court of the United States.

JAMES F. GLEN,
Counsel for Plaintiff in Error.

97 And thereupon, to-wit, on the 13th day of November, A. D. 1917, came the plaintiff in error, American Fire Insurance Company, a corporation, and filed in the Supreme Court of Florida its assignment of errors herein, the same being in the words and figures following, to-wit:

98 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,
vs.

KING LUMBER AND MANUFACTURING COMPANY, Defendant in Error.

Now comes the plaintiff in error in the above stated cause and files the following as an assignment of the errors it intends to rely upon in the Supreme Court of the United States on its writ of error prosecuted thereto in the said cause, viz.:

1st. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon were made subject to the provisions of the laws of Florida, and thereby denied full faith and credit to the laws of Pennsylvania, in which State the policies were effected.

2nd. The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix in *invitum* the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of Section 1 of Article Four of the Constitution of the United States, and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3rd. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon, although effected in Pennsylvania, were Florida contracts, so as to make applicable thereto the Statutes of Florida, as construed by the said Court.

99 4th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida denied to the plaintiff in error the right guaranteed by Section One of Article Four of the Constitution of the United States, to have full faith and credit given in Florida to the laws of Pennsylvania.

5th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida violated Section One of the Fourteenth Amendment to the Constitution of the United States.

6th. The construction given by the Supreme Court of Florida to Sections 2765 and 2777 of the General Statutes of Florida violated Section Ten of Article One of the Constitution of the United States, by impairing the obligation of the contracts sued upon.

JAMES F. GLEN,
Counsel for Plaintiff in Error.

100 And thereupon the Chief Justice of the Supreme Court of Florida made and filed in the said Court an order granting the petition hereinbefore mentioned for a writ of error in said cause to the Supreme Court of the United States, which said order is in the words and figures following, to-wit:

101 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MANUFACTURING COMPANY, Defendant in Error.

At a stated term, to-wit, the June Term A. D. 1917, of the Supreme Court of the State of Florida, held at the courtroom in the city of Tallahassee, Florida, on the 13th day of November, 1917, upon the motion of James F. Glen, attorney for the above named plaintiff in error, and upon filing a petition for writ of error and an assignment of errors, and it appearing that in the judgment of the Supreme Court of Florida to which said writ of error is prayed, in the several respects in which the same is questioned by the said assignment of errors, there was drawn in question the validity of a Statute of, or authority exercised under, the State of Florida, on the ground of their being repugnant to the Constitution of the United States, and the decision being in favor of their validity.

It is therefore ordered that a writ of error be and the same is hereby allowed, to have reviewed in the Supreme Court of the United States the judgment of the said Supreme Court of the State of Florida, heretofore rendered in this cause, the same to be returnable according to law, and the amount of security upon the said writ of error is hereby fixed at the sum of \$1000.00.

Done and ordered this 13th day of November, A. D. 1917.

JEFFERSON B. BROWNE,

Chief Justice of Supreme Court of the State of Florida.

102 And whereupon, to-wit, on the 13th day of November, A. D. 1917, the said plaintiff in error, American Fire Insurance Company, a corporation, filed in the Supreme Court of Florida a supersedeas bond as required by said allowance of writ of error herein, which bond, with its approval by the Chief Justice of the said Supreme Court of Florida is in the words and figures following, to-wit:

103 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MFG. COMPANY, Defendant in Error.

Know all men by these presents: That the Insurance Company of the State of Pennsylvania, as successor to the American Fire Insurance Company, a corporation organized and existing under the laws of the State of Pennsylvania, as principal, and United States Fidelity and Guaranty Company, a surety company organized and existing under the laws of the State of Maryland, and duly author-

ined under the laws of Florida to do business, as surety, are held and firmly bound unto King Lumber & Manufacturing Company, a corporation organized and existing under the laws of Florida, in the penal sum of \$1,000.00, for the payment whereof well and truly to be made they hereby bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed on this, the 13th day of November, A. D. 1917.

The condition of the foregoing obligation is such that, whereas the above named principal has sued out a writ of error from the judgment of the Supreme Court of the State of Florida in a certain cause therein pending wherein it was plaintiff in error and the above named obligee was defendant in error, rendered in the June Term A. D. 1917, of the said Supreme Court of Florida, wherein the said Court affirmed a certain judgment of the Circuit Court of the Tenth Judicial Circuit of Florida in and for De Soto County, the 104 said writ of error being returnable to the Supreme Court of the United States at Washington on the 11th day of December, A. D. 1917.

Now, if the said principal shall prosecute the said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall become null and void, otherwise it shall remain in full force and virtue.

INSURANCE COMPANY OF THE STATE
OF PENNSYLVANIA,

As Successors to AMERICAN FIRE INSURANCE COMPANY,

By JAMES F. GLEN, [SEAL.]

Attorney in Fact, Principal.

[Corporate Seal.] UNITED STATES FIDELITY & GUARANTY CO.,

By JAMES C. MCKAY,

Atty in Fact, Surety.

Taken and approved this 13th day of November, A. D. 1917.

JEFFERSON B. BROWNE,

Chief Justice of Supreme Court of Florida.

105 And on the 13th day of November, A. D. 1917, the attorney and counsel for the aforementioned plaintiff in error herein filed in said Supreme Court of Florida a praecipe giving directions to the Clerk of said Court for making up transcript of the record and his return in said Court to the Supreme Court of the United States, which praecipe is in the words and figures following, to-wit:

106 In the Supreme Court of Florida, June Term, A. D. 1917.

AMERICAN FIRE INSURANCE COMPANY, Plaintiff in Error,

vs.

KING LUMBER & MANUFACTURING COMPANY, Defendant in Error.

In making up the transcript of record for the Supreme Court of the United States in the above stated cause, the Clerk of the Supreme Court of Florida will incorporate into and make parts of the said transcript the following proceedings, and no others, namely:—

1. Transcript of record from Circuit Court as filed in Supreme Court, omitting index, directions for making it, and Clerk's certificate.
2. Judgment of Supreme Court of Florida.
3. Petition for rehearing.
4. Order denying petition for rehearing.
5. Petition for writ of error to United States Supreme Court.
6. Assignment of errors filed with foregoing petition.
7. Order allowing the said writ of error.
8. Supersedeas bond on said writ of error.
9. Opinion filed in the Supreme Court of Florida.
10. These directions for making up transcript.

JAMES F. GLEN,
Counsel for Plaintiff in Error.

Receipt of a copy of the foregoing directions is hereby acknowledged and it is agreed that the Clerk of the Supreme Court of Florida may make up the transcript of record in accordance therewith.

TREADWELL & TREADWELL,
Counsel for Defendant in Error.

107 UNITED STATES OF AMERICA,
Supreme Court of Florida:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause with all things concerning the same and I further certify that the foregoing pages numbered from 94 to 106 inclusive, contain true and correct copies of the petition for writ of error and allowance thereof, of the writ of error bond, of the assignment of errors and of the directions to the Clerk for making up transcript of the record and receipt of attorneys for defendant in error for copy of such directions to the Clerk.

And I further certify that the original writ of error bond and copies of the original writ of error are now on file in my office as Clerk of the Supreme Court of the State of Florida.

In witness whereof I have hereunto subscribed my hand and af-

fixed the seal of said Supreme Court of Florida in the City of Tallahassee, the Capital, this the 21st day of November, A. D. 1917.

[Seal Supreme Court of the State of Florida.]

G. T. WHITFIELD,
Clerk Supreme Court, State of Florida.

108 UNITED STATES OF AMERICA, ss:

To King Lumber and Manufacturing Company, a corporation organized and existing under the laws of Florida, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to writ of error filed in the Clerk's Office of the Supreme Court of the State of Florida, wherein American Fire Insurance Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this, the 13th day of November, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

JEFFERSON B. BROWNE,
Chief Justice of Supreme Court of the State of Florida.

The King Lumber & Manufacturing Company hereby accept service of the above citation.

TREADWELL, & TREADWELL,
Attorneys for the King Lumber & Manufacturing Company.

100 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Florida before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between American Fire Insurance Company, a corporation, plaintiff in error, and King Lumber & Manufacturing Company, a corporation, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the

United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said American Fire Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 11th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should
110 be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 13th day of November in the year of Our Lord one thousand nine hundred and Seventeen.

[Seal Supreme Court of the State of Florida.]

F. W. MARSH,
*Clerk U. S. District Court, for
the Northern District of Florida.*
By M. CHOATE,
Deputy Clerk.

Allowed by

JEFFERSON B. BROWNE,
*Chief Justice of the Supreme Court
of the State of Florida.*

Filed in Supreme Court, November 13, 1917.

G. T. WHITFIELD,
Clerk.

111 [Endorsed:] In the Supreme Court of Florida, June term, A. D. 1917. American Fire Insurance Co., plaintiff in error, vs. King Lbr. & Mfg. Company, defendant in error. Writ of error. Filed Nov. 13, 1917. G. T. Whitfield, clerk Supreme Court.

Endorsed on cover: File No. 26,243. Florida Supreme Court. Term No. 776. American Fire Insurance Company, plaintiff in error, vs. King Lumber & Manufacturing Company. Filed November 27th, 1917. File No. 26,243.

United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said American Fire Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the 11th day of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should 110 be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the 13th day of November in the year of Our Lord one thousand nine hundred and Seventeen.

[Seal Supreme Court of the State of Florida.]

F. W. MARSH,
Clerk U. S. District Court, for
the Northern District of Florida.
By M. CHOATE,
Deputy Clerk.

Allowed by

JEFFERSON B. BROWNE,
Chief Justice of the Supreme Court
of the State of Florida.

Filed in Supreme Court, November 13, 1917.

G. T. WHITFIELD,
Clerk.

111 [Endorsed:] In the Supreme Court of Florida, June term, A. D. 1917. American Fire Insurance Co., plaintiff in error, vs. King Lbr. & Mfg. Company, defendant in error. Writ of error. Filed Nov. 13, 1917. G. T. Whitfield, clerk Supreme Court.

Endorsed on cover: File No. 26,243. Florida Supreme Court Term No. 776. American Fire Insurance Company, plaintiff in error, vs. King Lumber & Manufacturing Company. Filed November 27th, 1917. File No. 26,243.

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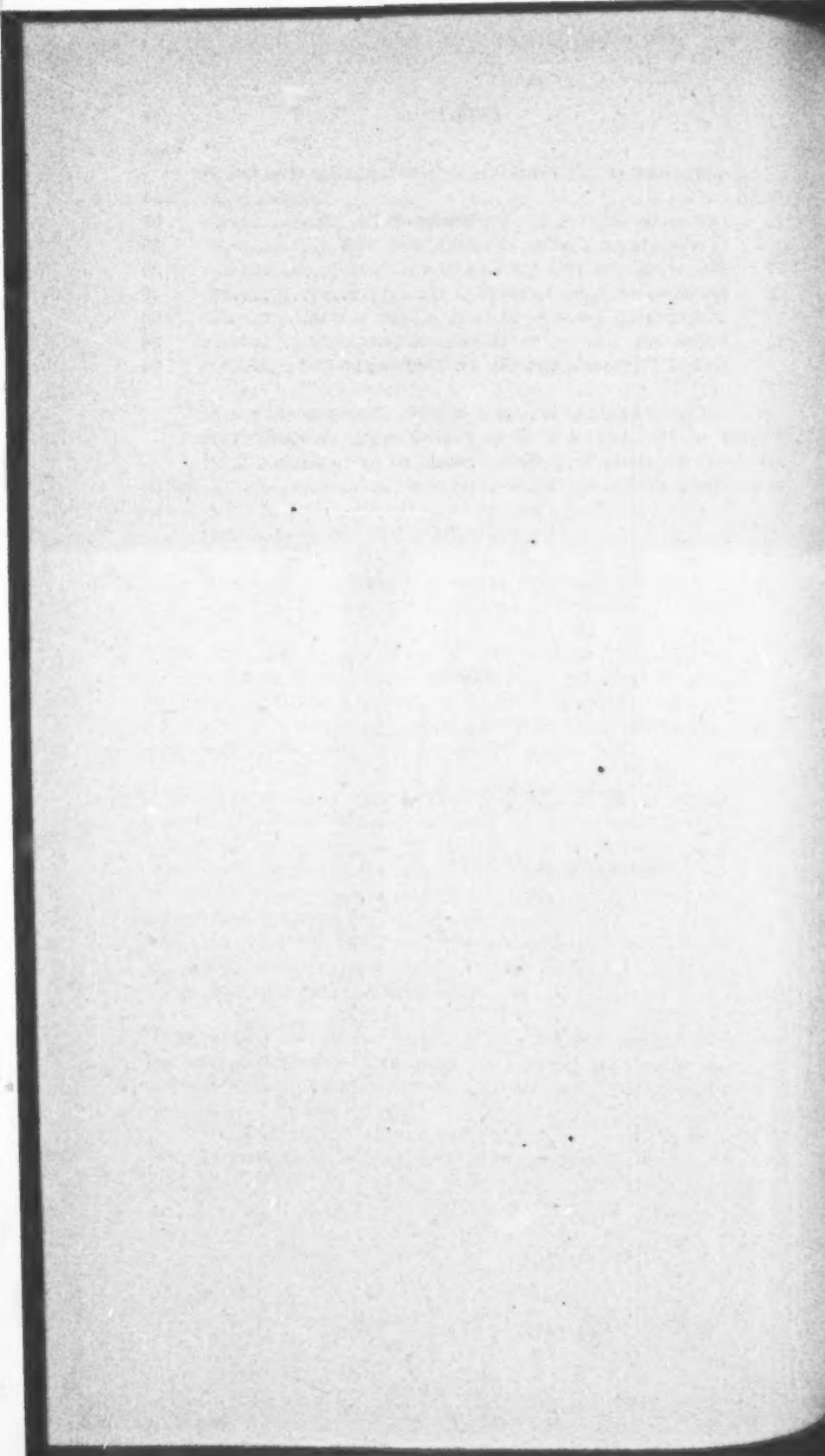
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(37006)



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1917.

No. 776.

**AMERICAN FIRE INSURANCE COMPANY, A CORPORATION,
PLAINTIFF IN ERROR,**

vs.

**KING LUMBER & MANUFACTURING COMPANY, A
CORPORATION, DEFENDANT IN ERROR.**

BRIEF FOR PLAINTIFF IN ERROR.

This case was decided in the trial court on demurrer filed by King Lumber and Manufacturing Company, hereinafter called the Manufacturing Company, to a rejoinder of the American Fire Insurance Company, hereinafter called the Insurance Company, to certain replications of the Manufacturing Company to a plea of the Insurance Company. The trial court sustained the demurrer, and rendered final judgment thereon in favor of the Manufacturing Company

against the Insurance Company; hence there can be no controversy as to the facts, but solely as to the law.

The suit was upon two policies of insurance covering items constituting part of the plant and product of the Manufacturing Company. The policies were executed at the home office of the Insurance Company in Philadelphia on May 8, 1912, and the declaration declares upon them as effected and issued to the defendant on that date, and avers destruction of the premises insured in such circumstances as to come within the undertakings and promises of the policies. The policies were made by reference parts of the declaration and each contains a warranty in the following language:

"Warranted same gross rate, terms and conditions as and to follow the American Central Insurance Company, of St. Louis, Mo., and that said Company has throughout the whole time of this policy, at least \$5,000.00 on the identical subject matter and risk and in identically the same proportion on each separate part thereof; otherwise this policy shall be null and void."

The proofs of loss were made parts of the declaration, and expressly averred the issuance of each policy at the agency of the Company in Philadelphia.

The Insurance Company pleaded to the declaration that it was a Pennsylvania corporation, not engaged in the transaction of business in Florida, and having no agent or representative in Florida, and that the policies were made, executed and delivered in the State of Pennsylvania, and secured in that State by the Manufacturing Company through Lowry & Prince, of Tampa, Florida, as brokers of the Manufacturing Company, and the Insurance Company required the foregoing warranty to be inserted in the policies. The plea then averred that, without the knowledge of the Insurance Company, the American Central Insurance Company of St. Louis, Mo., had cancelled its policies prior to the fire, and at the time of the loss carried no insurance on the property.

The Manufacturing Company filed four replications to this plea, or a replication consisting of four parts, as said by the Supreme Court of Florida, insisting by way of reply upon four contentions as follows:

"First. That it denies that at the time the said policies went into force and were executed and delivered, that the defendant was not engaged in the transaction of business in the State of Florida, but states the fact to be that at that time, and as far back as 1908, the defendant was transacting business within the State of Florida, and was in fact transacting business with the plaintiff. That on April 14, 1908, the defendant, through Lowry & Prince, of Tampa, Florida, assumed a risk by the policy of fire insurance on part of the property of the plaintiff, described in the policies sued on herein, and that the said policy of April 14, 1908, so written by the said defendant was from time to time renewed and kept in force, and additional insurance was written on said property, and finally in 1912 policies sued on in this cause were written, and that defendant, before accepting the risk provided for by the first policy written in 1908, consulted with Lowry & Prince as to the nature of the risk assumed, and from time to time, from April 14, 1908, to the date of the fire, consulted and advised with Lowry & Prince as to the physical condition of your repliant's property, and as to the advisability of assuming a risk thereon, and relied upon the said Lowry & Prince for its information on this subject. And repliant further shows that the said Lowry & Prince caused the defendant to write the said first policy in 1908, and said Lowry & Prince caused and procured the defendant to renew said policy from time to time, and to finally write and issue policies here sued on, covering repliant's property, and that repliant from 1908 to the date of the policies here sued on, paid unto the said Lowry & Prince, premiums charged by the said defendant for said policies, and said premiums were forwarded by the said Lowry & Prince, less their commission, which commission was allowed by the said defendant, to the said defendant, and that at the time the policies

sued on herein were delivered to repliant, repliant paid the premium charged by the said defendant therefor, to Lowry & Prince, and the said Lowry & Prince forwarded the said premium to the said defendant. Therefore, repliant also denies that said defendant at the time of the execution and delivery of the policies sued on, had no agent or representative in the State of Florida, but states the fact to be that Lowry & Prince, who procured and caused said policies to be written, who collected the premiums and forwarded the same to the defendant, were the agents of the defendant.

"Second. For a further replication to said first plea, repliant says that it is true that the two fire insurance policies sued on in this cause contained the warranty set out in said plea. Repliant states the fact to be that Lowry & Prince, the agents of the defendant as aforesaid, when they delivered the policies so sued on to repliant, called repliant's attention to said warranty clause, and stated to repliant that said clause would not affect repliant, and should be disregarded by repliant and gave as their reasons why said warranty clause should be disregarded, that the repliant had at that time in the American Central Insurance Company of St. Louis, Mo., Six Thousand Five Hundred (\$6,500.00) Dollars of insurance, covering the items insured by the policies of the defendant sued on herein.

"Repliant further says that it at that time was carrying a large amount of insurance, approximately Forty-Five Thousand (\$45,000.00) Dollars in various companies, and that it did not keep up very closely with the amount of insurance that it had in any particular company, being careful only to keep the total amount approximately Forty-Five Thousand Dollars, in reputable old-line companies, and that it therefore relied upon the representation of the said Lowry & Prince, who stated that they had investigated the policies of repliant in the said American Central Insurance Company of St. Louis, Mo., and that repliant had Six Thousand Five Hundred Dollars of insurance, as aforesaid.

"Repliant further says that relying upon the repre-

sentation of said Lowry & Prince, agents of the said defendant, and relying upon their instructions to disregard said warranty, repliant accepted said policies, and paid the said Lowry & Prince the premium therefor, charged by the said defendant.

"*Third.* Replying further to said first plea repliant says: That sometime prior to July 25, 1912, Lowry & Prince as agents of the defendant aforesaid, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #308149, in the sum of One Thousand Five Hundred (\$1,500.00) Dollars and suggested to repliant that there be substituted for the last-mentioned policy, a policy in a like sum in the People's National Fire Insurance Company of Philadelphia. This information coming from the said Lowry & Prince, the agents of the defendant, and this suggestion having been made by the agents of the defendant, repliant agreed to the cancellation of the said policy, and the substitution of a policy with the People's National Fire Insurance Company of Philadelphia.

"Repliant further says that some time prior to October 27, 1912, the said Lowry & Prince, the agents as aforesaid of the said defendant, notified repliant that the American Central Insurance Company of St. Louis, Mo., was desirous of cancelling its policy #303192, in the sum of One Thousand Five Hundred (\$1,500.00) Dollars and the said Lowry & Prince suggested that there be substituted for the said last mentioned policy, a policy in a like amount in the American Union of Philadelphia.

"Said information and said suggestions being given by the agents of said defendant as aforesaid, repliant agreed that said last mentioned policy might be cancelled, and a policy in the American Union of Philadelphia substituted therefor.

"Repliant further says that the said Lowry & Prince, agents of the defendant as aforesaid, assured repliant that the cancellation of the policies above mentioned was not a violation of the warranty set forth in said plea, provided a like amount of insurance was carried in some other old-line insurance company.

"Repliant further says that as soon as said policies were cancelled, new policies were substituted in pursuance of said suggestion, in the companies above mentioned, and repliant therefore denies that said policies were cancelled without the knowledge of the defendant, but says that said policies were cancelled with the full knowledge and consent, and at the suggestion of Lowry & Prince, who were agents of said defendant as aforesaid, acting for it in the State of Florida, who, as such agents, had caused policies sued on to be issued, and who had collected the premiums paid by repliant for said policies sued on and forwarded the same to the said defendant, and that said defendant thereby waived said warranty clause, ratified and confirmed the cancellation of said policies of insurance in the American Central Insurance Company of St. Louis.

"Fourth. Further replying to said first plea, repliant denies that said policies of insurance so sued on, were delivered in the State of Pennsylvania, but states the fact to be that same were delivered by Lowry & Prince, as agents for said defendant, to repliant, within the State of Florida, and accepted by repliant within said State."

To these replications the Insurance Company filed the following rejoinder, to which a demurrer was interposed and sustained:

"That under the public laws of the State of Pennsylvania, which are entitled to full faith and credit in the State of Florida, the defendant is authorized to write and issue, in the State of Pennsylvania, policies of insurance on property outside the State of Pennsylvania, and in April, 1908, at Philadelphia, in the State of Pennsylvania, Lowry & Prince of Tampa, Florida, with whom the defendant had no connection or relations, as brokers of the plaintiff, made application to the defendant requesting it to issue a policy insuring the property of the plaintiff situate in Florida, which the defendant did, and thereafter, from time to time, on the written requests of the said Lowry & Prince, addressed to the defendant at Philadelphia, in the State of Pennsylvania, the defendant

continued to write and issue policies of insurance on the plaintiff's property, including those sued upon, but all of said policies were written and executed by the defendant in the State of Pennsylvania, and thereupon delivered and sent by mail to the said Lowry & Prince at Tampa, Florida, as brokers of the plaintiff, and each contained a similar warranty clause as to the existence of concurrent insurance on the property with an approved designated company doing business in the State of Florida, except that, from time to time, at the request of the said Lowry & Prince, the names of the companies were changed, as companies designated cancelled their risks on the property, and the name of the American Central Insurance Company of St. Louis, Missouri, was inserted in the contracts sued on at the special request of the said Lowry & Prince, stated by the said Lowry & Prince to the defendant to be made by them because they were agents for that company and would know of any cancellation by it, while some other company they did not represent might cancel without their knowledge; that the said Lowry & Prince were not agents of the defendant, or authorized by it to make contracts of insurance, to accept risks, to write, sign or issue policies, to collect, receive or receipt for moneys on its account, to waive any provisions in the contracts sued on, or to represent it in any manner, shape or form, but the plaintiff desired to secure, through them, insurance to the amount of \$45,750.00, in accordance with a printed form prepared for the plaintiff by Lowry & Prince and annexed to the policies sued on, all of which they were unable to place with companies for which they were agents, and thereupon they transmitted to the defendant, at its main office in Philadelphia, the original and subsequent applications for insurance upon the plaintiff's property, received by mail the policies for the plaintiff, and transmitted by mail for it the amount of the premiums, less the usual broker's commission; and the defendant denies by issuing the aforesaid policies for the plaintiff, or otherwise, it was engaged in the transaction of business in the State of Florida, and denies that the plaintiff paid to Lowry & Prince for the defendant any premiums on the policies of insurance, written

by the defendant, and denies that Lowry & Prince were agents of the defendant, and denies that prior to the furnishing of proofs of loss by the plaintiff, it had any notice or knowledge that the American Central Insurance Company of St. Louis, Missouri, had cancelled its policies on the property insured and did not carry \$5,000 on the identical subject matter and risk, and denies that it advised or consulted with Lowry & Prince as to the advisability of the risk, or otherwise, except to the extent that it did request information from them as to the subject matter insured, and the companies carrying insurance thereon."

The material provisions of the law of Florida regulating the transaction of business by foreign insurance companies are embodied in the succeeding sections of the General Statutes:

"2758. Statement prior to issue of certificate of authority.—No insurance company, association, firm or individual, whether incorporated or not incorporated, and whether incorporated or organized under the laws of this State, or of any other State or country, nor its agents, attorneys, subscribers or representatives, directly or indirectly, shall take any risk or transact any business of insurance in this State, unless such company, association, firm or individual has first obtained a certificate of authority from the State Treasurer under the direction of the Board of Insurance Commissioners; and before obtaining such certificate, such company, association, firm or individual shall furnish the Treasurer with a statement under oath of the president, vice-president or manager of the company, or of the attorneys, members, or subscribers severally of such association or firm, or of such individual showing: First, the name and locality of the company, association, firm or individual; Second, the amount of its capital stock and the amount paid up; the maximum amount for which each member or subscriber to any association or firm may become liable; Third, the amount of accumulations; Fourth, the assets of the company, association, firm or individual; including, 1st, the amount of cash

on hand and in the hands of agents or other persons; 2nd, the real estate unencumbered; 3d, the bonds owned by the company, association, firm or individual and how they are secured, with rates of interest thereon, and schedule; 4th, debts of the company, association, firm or individual, secured by mortgage; 5th, debts otherwise secured; 6th, debts on premiums; 7th, all other securities; Fifth, the amount of liabilities due or not due to, banks or other creditors, including reinsurance reserve on all risks in force; Sixth, losses adjusted and due; Seventh, losses adjusted and not due; Eighth, losses unadjusted; Ninth, losses in suspense waiting for further proof; Tenth, all other claims against the company, association, firm or individual; Eleventh, the greatest amount insured in any one risk; Twelfth, the act of incorporation or organization of such company, association, firm or individual; Thirteenth, the amount of gross receipts of such company, association, firm or individual, in the State of Florida during the preceding year. The Board of Insurance Commissioners shall cause to be prepared, and shall furnish to each insurance company, association, firm or individual, printed forms of the statement required. Such statement shall be filed in the office of the State Treasurer, together with a written agreement under the seal of the company, association, firm or individual, signed by the president and secretary of the company, or by its manager or by each subscriber of the association, or by the firm or individual, and agreeing on the part of said company, each subscriber of the association, firm or individual that service of process in any civil action against such company, association, or each subscriber thereof, or firm or individual, may be made upon any agent or representative of the company, association, firm or individual in this State, and authorizing such agent or representative for and on behalf of such company, each subscriber of the association, or firm or individual to admit such service of process on him and agreeing that the service of process upon any agent or representative shall be as valid and binding upon the company, each subscriber of the association, or firm or individual, as if made

upon the president or secretary, or each member or subscriber thereof."

"2759. Amount of assets; certificate; deposit of securities; life insurance companies; live stock insurance companies.—No insurance company, association, firm or individual, not of this State, nor agent nor representative thereof, shall transact any business of insurance in this State, unless such company, association, firm or individual is possessed of at least two hundred and fifty thousand dollars in value, invested in United States or State bonds, or other bankable interest-bearing stocks issued in the United States, at their market value. Upon complying with the preceding section and furnishing evidence to the satisfaction of the Board of Insurance Commissioners that such company, association, firm or individual has actually invested the amount above stated in such securities as hereinbefore mentioned, the State Treasurer shall issue a certificate thereof, with the authority of such company, association, firm or individual to transact the business of insurance in this State. Insurance companies incorporated under the laws of this State, or any association, firm or individual of the State, however, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the said Board that such company, association, firm or individual is possessed of, and has actually invested at least twenty-five thousand dollars in United States or State bonds or other bankable stocks or securities issued in the United States, at their market value, and by otherwise complying with the provisions hereof. The Board of Insurance Commissioners shall, in addition to the certificate hereinbefore provided for, issue a certificate to any insurance company incorporated under the laws of this State, and which shall have previously thereto deposited with the State Treasurer one hundred thousand dollars in United States or State bonds, or other negotiable stocks or securities issued in the United States, as their market value, as a guaranty fund for the security of the policy holders of such company, upon satisfactory evidence to them that such securities to such an amount have been deposited with the State Treasurer. Life insurance

companies incorporated or organized under the laws of another State shall be entitled to a certificate to transact the business of insurance in this State by furnishing to the satisfaction of the board that it is possessed of and has actually invested two hundred thousand dollars in United States bonds, or other bankable or interest-bearing stocks issued in United States at their market value, or in mortgages or unencumbered real estate worth double the amount loaned thereon, inclusive of buildings thereon, and by otherwise complying with the provisions thereof. Insurance companies insuring live stock or domestic animals, incorporated or organized under the laws of any other State, shall be entitled to such certificate of authority by furnishing evidence to the satisfaction of the board that such company, association, firm or individual is possessed of, and has total assets of at least two hundred thousand dollars and by otherwise complying with the provisions hereof."

"2760. Renewal of statement, etc., and certificate.—The statement and evidence of investment required by the two preceding sections shall be renewed annually in the month of January in each year. The first statement may be made at any time when the certificate of authority is desired, and shall hold good until the succeeding January. The board, on being satisfied that the capital, securities and investments remain secure as at first, shall direct the State Treasurer to furnish renewal of certificate, as aforesaid, the certified copy of which, with the certified copy of the statement upon which the same was obtained, shall be filed, kept and published in the same manner and be governed in all respects as the original.

"2761. Revocation of certificate.—Whenever any insurance company, association, firm or individual doing business in this State, upon a reasonable request from said Treasurer shall refuse to comply with any of the provisions of this sub-chapter, and whenever it shall appear to the said board upon such examination, that in their opinion the assets of any such company, association, firm or individual are insufficient under these provisions to justify the continuance in business of any such company, association, firm or individual or that the condition of such

company, firm or individual is unsound, the Board of Insurance Commissioners shall forthwith revoke the certificate of authority granted on behalf of such company, association, firm or individual, and shall cause a notification thereof to be published in some newspaper published at the capital, and such company, association, firm or individual, or agent or representative of the same is, after such notice, required to discontinue the issuing of any new policy and the renewal of any previously issued; and whenever it shall appear upon such examination that any insurance company, association, firm or individual, its officers, representatives or agents have violated any of the provisions of this sub-chapter, the said board shall forthwith report the facts, with such statements and remarks as the board may deem expedient to the Attorney General, who shall at once prosecute said company, association, firm or individual, its officers, agent or representative."

"2765. Agents.—Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual, aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual, aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association, firm or individual, or who in any wise, directly or indirectly makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

"2766. Reinsurance only with authorized companies.—No fire insurance company or association authorized to transact business in this State shall re insure, or enter into any contract to indemnify, any fire insurance company or association not authorized to transact business in this State against loss by fire to property located in this State."

"2767. Provisions relating to local agents.—All

policies or contracts of indemnity against loss by fire to property located in this State issued or entered into by any fire insurance company or association authorized to transact business in this State shall be issued and countersigned by a local agent who is a resident of this State, regularly commissioned and licensed to transact a fire insurance business herein, and such local agent shall receive on each policy the full and usual commission allowed and paid by such company or association to its agents on business written or done by them for it; *Provided, however,* That this section shall not apply to policies of reinsurance issued to another fire insurance company regularly authorized and transacting a general fire insurance business in this State, nor to policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business."

"2768. Local agents not to divide commissions.—No fire insurance company or association authorized to transact business in this State shall request or permit any one acting as its agent and residing in this State to divide or offer to divide directly, or indirectly, the commission due to or received by any such agent with any other agent or broker or other person not a resident of this State."

"2769. Disqualification of local agents.—No fire insurance company or association authorized to transact business in this State shall be permitted to appoint or employ as its agents or representatives any person or persons who have divided or offered to divide, directly or indirectly, his or their commission or the profits of his or their business with any person or persons not a resident of this State, but shall immediately withdraw and cancel any such commission of authority to act as its agent in this State as may be held by any person or persons upon information that such person or agent has divided or offered to divide his or their commission with any person or persons not a resident of this State."

"2770. Renewal of licenses.—Renewal of license to transact the business of fire insurance in this State for companies or associations, shall only be issued after the secretary and manager of such company or

association so desiring to renew license to do business in this State, shall first have made oath that no policy or contract of insurance covering property located in the State of Florida has been issued, written or placed during the twelve months preceding, except by resident local agents of such company or association in Florida duly commissioned, and the said local agent has received the full, entire and usual commission due and allowed its agents, and that to the best of his knowledge and belief none of its agents or representatives in this State has divided or offered to divide his commission or other profits with any non-residents of this State, and that such company or association has not reinsured or entered into any contract to indemnify any fire insurance company or association not authorized to transact business in this State, and until and after such company or association shall have complied with all other laws of this State in respect to the admission of companies of other States or foreign countries."

"2771. Examination by Board of Commissioners.—Whenever the Board of Insurance Commissioners shall have received information that any fire insurance company or association has violated any of the provisions of this sub-chapter, they are authorized, at the expense of such company or association, to examine by themselves or their accredited representatives, at the principal office or offices of such company or association located in the United States of America, or in any foreign country, and also of such other offices or agencies of such company or association, as they may deem proper, all books, records and papers of such company or association, and may examine under oath the officers, managers and agents of such company or association as to such violation or violations. The refusal of any such company or association to submit to such examination or to exhibit its books and records for inspection shall constitute a forfeiture of its license as hereinafter provided for."

"2772. Revoking licenses of company.—If any fire insurance company or association shall violate or fail to observe and comply with any or all of the provi-

sions of this sub-chapter applicable thereto, it immediately shall become the duty of the Board of Insurance Commissioners to investigate same, and if the Board of Insurance Commissioners are themselves satisfied as to the guilt of the insurance company or association, it shall be the duty of the Board of Insurance Commissioners, in the manner now provided by law, to revoke the license of such company or association to transact business in this State, and such revocation shall continue for at least one year from the date thereof; nor shall any insurance company or association whose authority to transact business in this State shall have been so revoked be again authorized or permitted to transact business herein until it shall have filed in the office of the insurance commission a certificate signed by its president, or other chief officer, to the effect that the terms and obligations of the provisions of this sub-chapter are accepted by it as a part of the condition of its right and authority to transact business in this State."

"2777. Who agent of company.—Any person who solicits insurance and procures applications therefor shall be held to be agent of the party issuing a policy upon such application, anything in the application or policy to the contrary notwithstanding."

In sustaining the demurrer to the rejoinder the trial court held that section 2765 of the General Statutes of Florida applied (notwithstanding the averments of the rejoinder, that the policies were executed and delivered in Pennsylvania, and notwithstanding the averment that Lowry & Prince were not agents of the Insurance Company, or authorized to represent it in any manner, shape or form), and made Lowry & Prince agents of the Insurance Company. It further held that, regarding them as such agents, the Insurance Company was estopped from insisting upon the terms of the policies, by reason of the matters set up in the pleas, so that the disposition of the case was controlled by applying the statute to the case as disclosed in the pleadings.

On writ of error to the Supreme Court of Florida it was

contended by the Insurance Company that the application of section 2765 of the General Statutes of Florida, above quoted, to the contracts effected in the State of Pennsylvania, denied full faith and credit to the laws of Pennsylvania, violated the 14th Amendment to the Constitution of the United States, and violated Article VI of the Constitution of the United States, requiring the judges in every State to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding. By a divided court the judgment of the trial court was affirmed, and a writ of error thereupon allowed to this court.

The assignments of errors in this court are as follows:

1st. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon were made subject to the provisions of the laws of Florida, and thereby denied full faith and credit to the laws of Pennsylvania, in which State the policies were effected.

2nd. The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix *in invitum* the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of section 1 of Article IV of the Constitution of the United States, and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

3rd. The Supreme Court of Florida erred in holding and deciding that the policies of insurance sued upon, although effected in Pennsylvania, were Florida contracts, so as to make applicable thereto the Statutes of Florida, as construed by the said court.

4th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida denied to the plaintiff in error the right guaranteed by section 1 of Article IV of the Constitution of the United States, to have full faith and credit given in Florida to the laws of Pennsylvania.

5th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated section 1 of the Fourteenth Amendment to the Constitution of the United States.

6th. The construction given by the Supreme Court of Florida to sections 2765 and 2777 of the General Statutes of Florida violated section 10 of Article I of the Constitution of the United States, by impairing the obligation of the contracts sued upon.

ARGUMENT.

Fifth Assignment of Error.

By the fifth assignment of error it is contended that the majority of the Supreme Court of Florida construed section 2765 of the General Statutes of Florida, so as to make it violate section one of the Fourteenth Amendment to the Constitution of the United States. This presents a broader contention than those presented under the remaining assignments of error, and we shall discuss it first, as the contention, if sustained, makes it unnecessary to consider the narrower contentions, dependent upon the proposition that the contracts of insurance were Pennsylvania contracts, to which the Florida statute could not be applied, conformably to the provisions of the Federal Constitution.

The statute reads as follows:—

“Any person or firm in this State, who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for such insurance company, association, firm or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company, association, firm or individual aforesaid, for a policy of insurance or any renewal thereof, although such policy of insurance is not signed by him or them, as agent or representative of such company, association,

firm or individual, or who in any wise, directly or indirectly, makes or causes to be made, any contract of insurance for or on account of such insurance company, association, firm or individual, shall be deemed to all intents and purposes an agent or representative of such company, association, firm or individual."

This act, it will be observed, is not confined to insurance companies, domestic or foreign, but applies equally to firms or individuals entering into contracts of insurance, and its constitutionality must be determined in view of its scope, regarding the situation of corporations and individuals within its terms as identical. Moreover, the laws of Florida expressly recognize the right of individuals and firms to engage in the insurance business, and they are classified together with corporations in all the laws regulating the transaction of fire insurance.

Gen. Statutes, secs. 2757, 2758, 2759, 2761, 2762.
State vs. Board of Ins. Commrs., 37 Fla., 564.

The determination of the question presented by this assignment of error, therefore, is in no way affected by the general doctrine as to the power of a State to exclude foreign corporations, or attach such conditions as it sees fit to their admission.

Carroll vs. Greenwich Ins. Co., 199 U. S., text 409.

The question is whether or not the Florida legislature could make the designated persons agents to all intents and purposes of any corporation, association, firm or individual entering into contracts of insurance; and in determining that question the court is bound by the construction placed upon the statute by the Supreme Court of Florida.

Chicago, &c., Ry. Co. vs. Minnesota, 134 U. S., 418.

The Supreme Court of Florida in this case not only applied the statute to policies effected in the State of Pennsylvania, but it also held expressly that the statutory agency was not

confined to the particular acts done by a person in the designated class, and that the statute made the designated persons agents to all intents and purposes in the broadest sense, contrary to the opinion of this court in *Mutual Life Ins. Co. vs. Hilton Green*, 241 U. S., 613, to which it referred, but stated it had the right to place its own construction on a Florida statute. The effect of the decision of the Florida court is that a girl sent out from the office of a local agent to collect overdue premiums can bind an insurer as effectually as any general agent could, not only in regard to the policies for which she is to collect, but also as to all other business of the insurer. And the decision further places every one, directly or indirectly effecting the insurance, or doing the other acts specified in the statute, however humble the capacity in which such person acts, on an equality, so far as their power to bind the insurer is concerned, and on an equality with any general agent of the insurer. It seems to us that the act, as thus construed, cannot be sustained as a legitimate exercise of legislative power. It may be conceded that there is reason, in considerations of public welfare, to justify legislation concerning the subject of agents of insurers, and it may be admitted that legislation could provide that any person who directly or indirectly causes any contract of insurance to be made, or does certain acts in connection therewith, should be regarded *prima facie* as an agent of the insurer to all intents and purposes, in respect of what he actually does in the particular matter. But the vice in the statute, as construed by the court, lies in the fact that it precludes all inquiry into the actual relations between the insurer and one who directly or indirectly procures the insurance and not only makes the latter an agent of the insurer in respect of the transaction in which he plays a part, but extends that agency so as to make it coextensive with the insurer's business.

Could the court uphold legislation that made a lawyer's stenographer his agent to all intents and purposes, in the sense the Florida court attributes to these words in this

statute? Or, a law that authorized every track-layer on a railroad to make traffic agreements in its behalf, or to waive provisions in such agreements made by its executive officers? Or, a law that authorized every stoker on a steamship to bind the vessel to the performance of a charter? Or, a law that authorized every porter of a manufacturing establishment to pledge its credit by executing negotiable paper?

In none of the cases suggested would the exercise of legislative power be so extreme as in the present case, because in each of the suggested cases the authority would devolve upon one who was an employee, and thus in some sense an agent, of the principal, while in the present case one who is actually employed by the party desiring to secure insurance is made an agent of the other contracting party, with unlimited authority to bind the insurer.

The constitutionality of the statute must be tested by its result under the construction placed upon it by the Florida court, and the following is an example of what may occur. A. is the owner of a large saw-mill. The difficulty of obtaining adequate insurance on such properties is notorious. He applies to B., a broker for insurance. B. tells him that he thinks it might be possible to induce C. to take a part of the risk, and A. authorizes B. to secure C. to do so. B. takes the matter up with C., and C., on the solicitation of B., representing A., enters into a contract to insure the property of A. On these facts, the statute, as construed, conclusively makes B. the agent of C. to all intents and purposes, not only in regard to the particular transaction effected by or through B. for A., but also as to C.'s general business, although this is in absolute contradiction of the facts. It seems to us that no more arbitrary exercise of legislative power, in derogation of the freedom to contract, could well be conceived, and that it cannot be sustained under the rule of reason applicable to such legislation.

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that

the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Lawton *vs.* Steele, 152 U. S., text 137;
 Adair *vs.* U. S., 208 U. S., 161;
 Lochner *vs.* New York, 198 U. S., 45;
 Allgeyer *vs.* Louisiana, 165 U. S., 578;
 Coppage *vs.* Kansas, 236 U. S., 1;
 Adams *vs.* Tanner, 244 U. S., 590;
 Williams *vs.* Fears, 179 U. S., 270;
 Moredock *vs.* Kirby, 118 Fed., 180;
 Aikmann *vs.* Sanderson, 47 So., 600;
 State *vs.* Kreutzberg, 114 Wis., 530;
 Gulf, &c., R. Co. *vs.* Ellis, 165 U. S., 150.

This statute, as construed by the Florida courts in this case, conclusively makes the designated persons agents to all intents and purposes of the insurer, and forbids inquiry to determine the truth. The court so held in sustaining the demurrer to the rejoinder, which alleged that Lowry & Prince were not agents of the insurer or authorized to represent it in any manner, shape or form, and this brings into prominence another aspect in which the statute is obnoxious to the fourteenth amendment. The whole case of the Manufacturing Company depended upon establishing that Lowry & Prince were agents of the Insurance Company, as alleged by it, and not agents of the Manufacturing Company, as alleged by the Insurance Company; and it must be axiomatic that where matter of fact necessarily inheres in a cause of action, concerning which there is dispute, no statute can *conclusively* settle this matter of fact in favor of one class of litigants against another class, without denying the equal protection of the laws, as well as depriving the class discriminated against of property without due process of law.

"The judicial function under the Constitution is to apply the law; to apply the law necessarily involves the determination of the facts; and to determine the facts necessarily involves the investigation of evidence as a basis for that determination. To forbid investigation is to forbid the exercise of an indestructible judicial function. To make a rule of conclusive evidence, compulsory upon the judiciary, is to attempt an infringement upon their exclusive province."

II Wigmore on Evidence, Sec. 1353;
Mobile, &c., R. Co. vs. Turnipseed, 219 U. S.,
 35;
McFarland vs. Am. Sugar Ref. Co., 241
 U. S., 79;
Hawkins vs. Blakely, 243 U. S., 210;
Harris vs. Stearns, 17 So. Dakota, 439;
Downs vs. Blount, 170 Fed., 15;
Howard vs. Moot, 64 N. Y., 262;
Little Rock, &c., R. Co. vs. Payne, 34 Am.
 Rep., 55;
People vs. Rose, 207 Ill., 352;
Vega vs. Con. Elevator Co., 75 Minn., 308;
Larson vs. Dickey, 39 Nebr., 463;
 See also *U. S. vs. Klein*, 13 Wall., 128;
Kackel vs. Serviss, 167 N. Y. Supp., 348.

The case of *Coe vs. Armour Fertilizer Works*, 237 U. S., 413, which also went to this court from the Supreme Court of Florida, is somewhat similar in principle. In that case a Florida statute was condemned which permitted an execution to issue against an alleged stockholder of a corporation on an unpaid judgment against the corporation, without affording the alleged stockholder any opportunity for a hearing on the question whether or not he in fact bore that relationship to the corporation.

The contention now urged is clearly recognized in the case of *Orient Insce. Co. vs. Daggs*, 172 U. S., 557, in which the court distinguishes the case of an agreement constituting a valued policy from a conclusive presumption forced by law.

"It is one thing to attribute effect to the convention of the parties entered into under the admonition of the law, and another thing to give to circumstances, maybe accidental, conclusive presumption and proof to establish a result against property and liberty."

172 U. S., text 566;

See also, Yazoo, &c., R. Co. *vs.* Bent, 22 L. R. A. (N. S.), 821.

Second Assignment of Error.

All of the remaining contentions on the part of the plaintiff in error are in reality embraced within the second assignment of error, which is as follows:

"The Supreme Court of Florida erred in holding and deciding that the laws of Florida could operate to affix *in invitum* the status of agency for the insurer upon brokers of the insured, who effected insurance with a Pennsylvania corporation, in the State of Pennsylvania, in violation of section 1 of article four of the Constitution of the United States, and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States."

This assignment of error presents at the outset the question whether or not the policies were Pennsylvania contracts, and, if they were, whether or not the Florida laws could operate thereon in the respect in which they were given operation by the Florida courts. As we understand the decision of the majority in the Supreme Court of Florida it answered the first question by assuming an affirmative answer to the second, and thus begged the question; while the minority held that the contracts were Pennsylvania contracts, and that the law of Florida could not have the effect contended on the part of the Manufacturing Company, to make Lowry & Prince agents of the insurer and not of the insured. Correct thinking, as it seems to us, required an answer to the question whether or not the contracts were Pennsylvania contracts, independently of the purported scope of the

Florida statutes. Indeed, as we understand the opinion of the majority, it concedes this at the outset of the opinion, although it seems afterwards to lose sight of it. We shall reserve an analysis of the opinion, however, until discussion of the fundamental question.

A.

The declaration was the foundation of the plaintiff's case, and it should surely be possible to determine therefrom what were the contracts on which it relied. It made the policies parts of the declaration. They were executed at Philadelphia by a general officer of the Insurance Company on April 8, 1912, and the declaration alleges that "the said defendant issued to plaintiff its two certain policies of insurance on the 8th day of April, 1912, and thereby promised the plaintiff," etc. The policies provided they should not be valid "until countersigned by the duly authorized agent of the company at Philadelphia, Pa." There is no suggestion in the declaration that the policies first became effective in Florida, no allusion to anything that might indicate they were other than Pennsylvania contracts issued on the date alleged, and no claim that they were governed by any law other than the *lex loci contractus*. Beyond that, the Manufacturing Company's proofs of loss were made parts of the declaration, and these expressly averred the issuance of the policies at the Insurance Company's home office in Philadelphia (Transcript, pp. 5, 12). The policies themselves contained provisions in violation of the very statute of Florida which the court applied, *viz.*, that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," and the usual non-waiver clause in the standard form of policy, providing that "No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to

such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The declaration asserted the policies in their entirety as the Manufacturing Company's cause of action, averred a loss within their terms, and undoubtedly declared upon them as contracts effected in Pennsylvania on April 8, 1912.

*Com. Mut. Fire Insce. Co. vs. Fairbank Canning Co.,
173 Mass., 161.*

Stone vs. Penn. Yan., &c., Ry., 197 N. Y., 279.

Stone vs. Old Colony, &c., R. Co., 212 Mass., 459.

State Mutual Fire Insurance Co. vs. Brinkley, 61 Ark., 1.

French vs. People, 6 Col. App., 311.

Swing vs. Brister, 87 Miss., 516.

Baker vs. Spaulding, 71 Vt., 169.

Galloway vs. Standard Fire Insce. Co., 45 W. Va., 237.

S. M. Smith Ins. Agency vs. Hamilton Fire Insce. Co., 69 W. Va., 129.

Davis vs. Aetna Mut. Fire Ins. Co., 67 N. H., 218.

Note to Johnson vs. Insce. Co., 63 L. R. A., 833.

1 May on Insurance, sec. 66.

Mutual Life Ins. Co. vs. Cohen, 179 U. S., 262.

See Also North Western, &c., Co. vs. McCue, 223 U. S., 234.

Liverpool, &c., Co. vs. Phenix Ins. Co., 129 U. S., 397.

3 Page on Contracts, sec. 1718.

Richards on Insurance, sec. 92.

It cannot be doubted that the declaration recognized the contracts as completed and effective on April 8, 1912, thus necessarily effected in the State of Pennsylvania, and this is further manifested by the provision of the policies that they were to become effective when countersigned by the company's agent at Philadelphia, which was done there on that date. But other considerations forbid the conclusion that the contracts were Florida contracts. Regarded as Florida contracts they were effected in direct violation of the laws of Florida, and continued provisions forbidden by the laws of Florida. In determining the proper law of contract, the effort is to ascertain by what law the parties intended to bind themselves. If the intention of the parties is directly expressed it is controlling in all ordinary cases, but, if unexpressed, there is a presumption that the *lex loci contractus* controls; and there is a further presumption, which common sense itself suggests, that parties will not be presumed to have contracted with reference to a law which would make their contracts illegal in whole or in part, if they are equally referable to a law that would sustain them in their entirety.

Pritchard *vs.* Norton, 106 U. S., 124.

Gibson *vs.* Conn. Fire Ins. Co., 77 Fed., 561.

Re Missouri Steamship Co., L. R. (1889), 42 Ch. Div., 321.

The intrinsic evidence in the policies themselves conclusively shows an intention not to contract with reference to the law of Florida, first, by the provision declaring they were to become effective in Pennsylvania, and, second, by the clauses to which attention has already been called.

And in considering the force of these provisions, it is to be borne in mind that the policies purport to be in the standard form of the States of Connecticut, New York, New Jersey, Rhode Island, and North Carolina, so that in reality they are not in the language of the Insurance Company's

choice; and much more so are they not properly referable to the law of Florida, where material provisions in the standard form are invalid. It is attempted to import a different law to defeat the terms of the policies, because the entire controversy in this case is conclusively settled by the language of the policies themselves, in the provision that "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company," and in the further provision respecting non-waiver, if these provisions are regarded.

Aetna Life Ins. Co. vs. Moore, 231 U. S., 543.

Northern Assur. Co. vs. Grand View, &c., Assn., 183 U. S., 308.

Penman vs. St. Paul, &c., Ins. Co., 216 U. S., 311.

Lumber Underwriters vs. Rife, 237 U. S., 605.

It is impossible to *assume* an intention on the part of the Insurance Company to contract under the law of a State in which it was not authorized to do business, when the policies were issued and became effective at its home office in Pennsylvania, and especially when the policies in material provisions were not effective under the foreign law, to which it could have no intention of subjecting itself. The pleadings in this case admit that the Insurance Company was not doing business in Florida, unless it could be held as a matter of law that the issuing of policies and renewals on this particular property constituted the doing of such business, contrary to what this court said in *Allgeyer vs. Louisiana*, 165 U. S., text 592; and the situation is entirely different from that disclosed in the case of *Pennsylvania, &c., Ins. Co. vs. Meyer*, 197 U. S., 407, where for the purpose of jurisdiction it was held that a Pennsylvania company was doing business in New York, where it had resident directors and nearly one-third of the total amount of its risks, although in that case it was conceded that the contract was a Pennsylvania con-

tract. It is generally held that isolated transactions do not constitute the doing of business in such cases.

Frawley vs. Pennsylvania Casualty Co., 124 Fed., 259.

Romaine vs. Union Ins. Co., 55 Fed., 751.

Hazeltine vs. Ins. Co., 55 Fed., 743.

Marine Ins. Co., vs. St. Louis, &c., R. Co., 41 Fed., 643.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

Grant vs. Anderson, L. R. (1892) 1 Q. B., 108.

O Kura vs. Forsbackon, &c., L. R. (1914) 1 K. B., 715.

See also *Hunter vs. Mutual Reserve, &c., Co.*, 218 U. S., 573.

Provident, &c., Socy. vs. Kentucky, 239 U. S., 103. 19 Cyc., 1268.

The opinion of the majority in the Supreme Court of Florida states the well-recognized rule of common-law pleading, that where a pleading on its face has two intendments it must be construed most strongly against the pleader. And having regard to that rule it was singularly inconsistent to deny, as the court did (Record, p. 70), that the policies were declared upon as effected in the State of Pennsylvania.

B.

Having thus seen that the policies were Pennsylvania contracts, it remains to be considered whether or not the Florida courts could apply thereto the provisions of section 2765 of the General Statutes of Florida, consistently with the provisions of the Federal Constitution. We do not refer specially to section 2777 because it has no real bearing on the facts disclosed by the pleadings, and in any event the question is the same.

Section 2765 of the General Statutes, in its original form, was section 7 of chapter 1863, Acts of 1872, entitled "An Act Relating to Insurance Companies," which in general was of similar import to the present statutory provisions already quoted. In its original form this section read as follows:

"Any person or firm in this State who receives or receipts for any money on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who receives or receipts for money from other persons to be transmitted to any such company or individual aforesaid, for a policy of insurance, or any renewal thereof, although such policy of insurance is not signed by him or them as agent or agents of such company, or who in anywise directly or indirectly makes or causes to be made any contract or contracts of insurance for or on account of such insurance company, shall be deemed to all intents and purposes an agent or agents of such company, *and shall be subject and liable to all provisions, regulations and penalties of this chapter.*"

The only material change is the elimination of the last clause, italicised above, in the present statute; and it is perfectly plain that the statute, as originally enacted, was never intended to deal with the relations of the parties named therein, as regards their authority to bind their principals, but, as said by the Supreme Judicial Court of Massachusetts of a similar statute, "only to declare that certain classes of persons should be deemed to be so far agents of insurance companies as to be liable to the penalty prescribed."

Harrison vs. City Fire Ins. Co., 9 Allen, 231.

Markey vs. Mut. Ben. Ins. Co., 103 Mass., 78.

Wood vs. Firemen's Ins. Co., 126 Mass., 316.

That the statute in its present form was not intended to raise special agents with limited authority into general ones

with unlimited authority has been expressly decided by this court.

Mutual L. Ins. Co. vs. Hilton-Green, 241 U. S., 613.

But the Supreme Court of Florida in this case has placed a different construction upon the statute, which, so far as this court is concerned, it had power to do, provided it did not cause the statute to thereby encounter the Constitution of the United States and the laws of the United States made in pursuance thereof, as to which under article VI of the Federal Constitution "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Before proceeding further it may be well to analyze briefly the opinion of the majority of the Florida court, to see exactly what was held.

The opinion is incoherent, and it is not easy to discern any consistent line of argument relied upon for its support. It admits at the outset that the Florida statute could not operate outside the borders of Florida, and states that the question to be determined was whether or not the contracts of insurance must be held to be Florida or Pennsylvania contracts. It then states that the Insurance Company was amenable to the Florida laws, whether it had secured a permit to do business in Florida or not, if as a matter of fact it voluntarily engaged in business in Florida. It further states that although Lowry & Prince were acting as brokers for the Manufacturing Company it might also be true that they acted in a dual capacity, and by virtue of what was actually done by them the law could also hold them to be agents of the Insurance Company. It further states that the property insured was in Florida, that the policies were delivered to the Manufacturing Company in Florida by Lowry & Prince, who were not only acting as brokers for the Manufacturing Company, but also as agents for the Insurance Company; that the policies were and are Florida contracts,

and that by reason of the transactions had with Lowry & Prince, they being allowed the usual brokers' commission, the Insurance Company was doing business in Florida, and Lowry & Prince were its agents, which was confirmed by the fact that the Insurance Company requested information of them as to the subject-matter insured. From all of this it concluded that the laws of Pennsylvania had nothing to do with the transaction, and that Lowry & Prince, under the Florida statutes, were the agents to all intents and purposes of the Insurance Company. It further asserts that the court should not make a discrimination in favor of a foreign insurance company attempting to do business in Florida without complying with the statutory requirements.

In answer to the petition for rehearing the ground of decision is stated in the following language:

"In the rejoinder facts are alleged that the court holds to be sufficient to make Lowry & Prince the agents of the insurance company under the statute *and that such agency makes the policy subject to the jurisdiction of this State.*" (Record, p. 71.)

To sum up the whole matter, the opinion asserts that a Pennsylvania company, authorized by the law of Pennsylvania to issue policies on property in Florida, by issuing policies in Pennsylvania on property in Florida at the solicitation of brokers in Florida representing the insured, by requesting information from them as to the property insured, and allowing them the usual brokers' commission, was doing business in Florida and amenable to the laws of Florida, whereby the brokers were to an unlimited extent the agents of the Insurance Company, even although the policies issued in Pennsylvania expressly provided that no person not duly authorized in writing should be deemed an agent of the Insurance Company. We have already shown that the application of the Florida statute cannot rest upon the theory that the State of Florida could annex such con-

ditions as it saw fit to the right of a foreign corporation to do business in Florida, because the statute by its terms equally embraces individuals and firms; hence the conclusion of the court must necessarily rest upon the assertion that the State of Florida had power to directly affect by its legislation contracts effected in a foreign State, insuring property in Florida, either by reason of that fact alone, or by reason of the fact that the policies were solicited by an agent of the insured resident in Florida, who was allowed a broker's commission, and who furnished information regarding the property insured.

And this assertion, in its last analysis, is that Florida legislation can directly affect contracts entered into in Pennsylvania, pursuant to the laws of Pennsylvania, by a corporation of the State of Pennsylvania, which is precisely what the court was bound to admit, and did admit, Florida legislation could not do. Of necessity, the laws of one State can neither condition nor qualify the obligation of contracts entered into in another State, sanctioned by the laws of the latter State, as against one not subject to the laws of the former State.

New York Life Insurance Co. vs. Head, 234 U. S.,
149.

Allgeyer vs. Louisiana, 165 U. S., 578.

Royal Arcanum vs. Green, 237 U. S., 531.

Hartford L. Ins. Co. vs. Barber, decided Nov. 19,
1917.

Mut. L. Ins. Co. vs. Cohen, 179 U. S., 262.

Nutting vs. Massachusetts, 183 U. S., 553.

Dvlameter vs. S. Dakota, 205 U. S., 93.

See also Jeffreys vs. Boosey, 4 H. L. R., text 926.

MacLeod vs. Atty. Gen., L. R. (1891), App. Cases,

455.

N.Y. Life Ins. Co. vs. Dodge, 206 U. S. 357.

In the case of Old Wayne, &c., Asse. Co. vs. McDonough, 204 U. S., 8, this court held that a Pennsylvania statute

could not make the insurance commissioner of Pennsylvania agent of an Indiana corporation in respect to a policy effected in Indiana.

See also *Simon vs. So. Ry. Co.*, 236 U. S., 115.

Riverside, &c., Mills vs. Menefee, 237 U. S., 189.

Hunter vs. Insco. Co., 218 U. S., 573.

Pennsylvania, &c., Co. vs. Min. Co., 243 U. S., 93.

On general principles, the owner of property in Florida could insure it in Pennsylvania, at the home office of the company there, and thus effect a contract to be controlled by the law of Pennsylvania, even if the insurance company were doing some business in Florida, and authorized to do business there. In *Old Wayne, &c., Assce. Co. vs. McDonough*, *supra*, a citizen of Pennsylvania effected a contract of insurance in Indiana with an Indiana corporation, which was also doing business in Pennsylvania, yet this court held that the Pennsylvania statute which designated the insurance commissioner of Pennsylvania as an agent upon whom service could be had so as to bind the company did not apply to the transaction effected in Indiana, and reversed the judgment of the Supreme Court of Indiana upholding a recovery upon a judgment based upon such service.

With two exceptions, hereinafter mentioned, all the cases cited in the majority opinion in support of its conclusion that Lowry & Prince were agents of the Insurance Company, belong to two classes. One class is exemplified by cases like *Swing vs. Munson*, 191 Pa., 582, and *Rose vs. Kimberly*, 89 Wis., 545, which deny recovery by the insurer on assessment policies in cases of this character, on the theory that such contracts are opposed to the policy of the insurance laws in the States where they are sought to be enforced. And it is remarkable that such cases, denying recovery, are cited to support recovery. The other class is exemplified by *John R. Davis Lumber Company vs. Insco. Co.*, 95 Wis., 226, and *Welch vs. Insco. Co.*, 120 Wis., 456, which hold

that a foreign insurance company doing business in a State through authorized agents is subject, as to such business, to the laws of the State. Obviously such cases have no bearing on the question here involved.

The exceptions are *Stanhilber vs. Insec. Co.*, 78 Wis., 285, decided by the Supreme Court of Wisconsin in 1890, and *Fred Miller Brewing Co. vs. Insec. Co.*, 95 Iowa, 31, decided by the Supreme Court of Iowa in 1895. In the former case the court places the decision upon the ground that * * * "A contract insuring property in this State necessarily involves the doing of business in this State, and hence is subject to the laws of this State." In the latter case the ground of decision is the same, and both these cases are necessarily overruled by *Allgeyer vs. Louisiana*, decided by this court in 1897, in which the court reversed a decision of the Supreme Court of Louisiana based upon the same proposition. This court said:

"The Atlantic Mutual Insurance Company of New York has done no business within the State of Louisiana and has not subjected itself to any of the provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of *Louisiana*, and correlative the citizens of Louisiana had the right without the State of entering into a contract with an insurance company for the same purpose. Any act of the State legislature which should prevent the entering into such a contract * * * is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

165 U. S., text 592.

The majority opinion entirely misconceives the cases of *Hooper vs. California*, 155 U. S., 648, *Allgeyer vs. Louisi-*

ana, *supra*, and Nutting *vs.* Massachusetts, *supra*. The distinction it fails to observe is fundamental. It depends upon the proposition that a State has power to legislate concerning business carried on within the State by an agent within the State, but has no power to legislate concerning business transacted outside the State through contracts effected outside the State, as against one not subject to its jurisdiction.

See also *Assce. Socy. vs. Kentucky*, 239 U. S., 103.

French vs. People, 40 Pac., 483.

Swing vs. Brister, 87 Miss., 516.

Swing vs. Hill, 165 Ind., 411.

Insco. Co. vs. Hilton, 58 N. Y. Supp., 996.

Stone vs. Penn Yan, &c., R. Co., 197 N. Y., 279.

Stone vs. Old Colony St. R. Co., 212 Mass., 459.

Swing vs. Taylor, 68 W. Va., 621.

In other words, and in the last analysis, the Pennsylvania corporation could not be subject to the laws of Florida so long as it remained at its domicile in Pennsylvania, and it was impossible for the court to rightly determine, on demurrer to the rejoinder, which admitted the truth of all facts set forth in the rejoinder, that as a matter of law, in doing what the Insurance Company did in the State of Pennsylvania, it had left its domicile there and subjected itself to the laws of Florida.

There is no attempt to sustain the decision except by reference to the statute, which, as shown, could not be applicable. It is incidentally suggested that because the Insurance Company requested information of Lowry & Prince regarding the property insured that tended to make them the Insurance Company's agents, but the suggestion is puerile.

How otherwise was it to know what risk it was asked to assume? In furnishing such information they were agents

of the insured, and any statements they made bound the insured.

Hamblet vs. City Insce. Co., 36 Fed., 118.

II Mechem on Agency (2d ed.), sec. 2368.

And the fact that they were allowed the usual brokers' commission was equally immaterial.

United Firemen's Insce. Co. vs. Thomas, 92 Fed., 127.

Sharman vs. Cont. Insce. Co., 52 L. R. A. (N. S.), 670.

Seamans vs. Knapp, 89 Wis., 171.

Morris, &c., Co. vs. German F. Ins. Co., 126 L. A., 82.

Lycoming Fire Insce. Co. vs. Rubin, 79 Ill., 402.

Texas Fire Insce. Co. vs. Brown, 82 Tex., 631.

II Mechem on Agency (2d ed.), sec. 2368.

These suggestions, however, it is unnecessary to pursue, because they do not form the ground of the decision, which rests solely upon the application of the Florida statute to the Insurance Co., which never left its domicile in Pennsylvania so as to become subject to the law of Florida.

The judgment should be reversed.

Respectfully submitted.

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